THE ELEMENTS OF THE COMMON LAWVES OF ENGLAND,

Branched into a double Tract:

THE ONE

Containing a Collection of some principall Rules and Maximes of the Common Law, with their Latitude and Extent.

Explicated for the more facile Introduction of such as are studiously addicted to that noble Profession.

THE OTHER

The Use of the Common Law, for preservation of our Persons, Goods, and good Names.

According to the Lawes and Customes of this Land.

By the late Sir *Francis Bacon* Knight, Lo: Verulam, and Viscount S. Alban.

Videre Vtilitas.

LONDON,
Printed by the Assignes of *John More* Esquire.
1639.

1729.78.

A COLLECTION OF SOME PRINCIPAL RULES and MAXIMES of the Common Lawes of ENGLAND, WITH THEIR LATITUDE and EXTENT:

Explicated for the more facile Introduction of ſuch as are ſtudiouſly addicted to that noble Profeſſion.

By Sir FRANCIS BACON, then Sollicitor *generall to the late renowned Queene* Elizabeth, *and ſince Lord Chancellor of* ENGLAND.

Orbe parvo, ſed non occiduo.

LONDON,
Printed by the Aſſignes of *Iohn More* Eſquire.
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TO HER SACRED MAIESTIE.

I Doe here most humbly present and dedicate to your Sacred Majesty a sheafe and cluster of fruit of the good and favourable season, which by the influence of your happy government we enjoy; for if it be true that silent leges inter arma, *it is also as true, that your Majesty is in a double respect the life of our lawes: Once, because without your authoritie they are but* litera mortua; *and againe, because you are the life of our peace, without which lawes are put to silence: and as the vitall spirits doe not onely maintaine and move the body, but also contend to perfect and renew it, so your Sacred Majestie, who is* anima legis, *doth not onely give unto your lawes force and vigour, but also hath been carefull of their amendment and reforming; wherein your Majesties proceeding may be com-*

compared, as in that part of your government (for if your government be conſidered in all the parts, it is incomparable) with the former doings of the moſt excellent Princes that ever have reigned, whoſe ſtudy altogether hath been always to adorne and honour times of peace, with the amendment of the policy of their lawes. Of this proceeding in Auguſtus Cæſar *the teſtimony yet remaines.*

Pace data terris animum ad civilia vertit
Jura ſuum, legeſq; tulit juſtiſſimus auctor.

Hence was collected the difference between geſta in armis *and* acta in toga, *whereof he diſputeth thus.*

Ecquid eſt quod tam propriè dici poteſt actum ejus qui togatus in republica cum poteſtate imperioq; verſatus ſit, quam lex? quære acta Gracchi: leges Sempronii proferantur: quære Sillæ Corneliæ: quid Cn. Pom. tertius conſulatus, in quibus actis conſiſtet? nempe, in legibus: à Cæſare ipſo ſi quæreres quidnam egiſſet in urbe, & toga, leges multas ſe reſponderet & præclaras tuliſſe.

The ſame deſire long after did ſpring in the Emperour Juſtinian, *being rightly called* Ultimus Imperatorum Romanorum, *who having peace in the heart of his Empire, and making his warres proſperouſly in the remote places of his Dominions by his Lieutenants, choſe it for a monument and honour of his government, to reviſe the Romane lawes from infinite volumes, and much repugnancy, into one competent and uniforme corps of law; of which matter himſelfe doth ſpeake glorioufly, and yet aptly, calling of it,* proprium & ſanctiſſimum templum juſtitiæ conſe-

conſecratum : *a worke of great excellency, indeed, as may well appeare in that France, Italy, and Spaine, which have long ſince ſhaken off the yoke of the Romane Empire, doe yet nevertheleſſe continue to uſe the policy of that law : but more excellent had the worke beene, ſave that the more ignorant and obſcure time undertooke to correct the more learned and flouriſhing time. To conclude with the domeſticke example of one of your Majeſties royall Anceſtors ; King* Edward *the firſt your Majeſties famous progenitor, and the principall Law-giver of our nation, after hee had in his younger yeares given himſelfe ſatisfaction in the glory of armes, by the enterprize of the holy land, and having inward peace (otherwiſe than for the invaſions which himſelfe made upon Wales and Scotland, parts farre diſtant from the Centre of the Realme) hee bent himſelfe to endow his ſtate with ſundry notable and fundamentall lawes, upon which the government hath ever ſince principally reſted : of this example, and others the like, two reaſons may be given ; the one, becauſe that Kings, which either by the moderation of their natures, or the maturitie of their yeares and judgement doe temper their magnanimitie with juſtice, doe wiſely conſider and conceive of the exploits of ambitious warres, as actions rather great than good, and ſo diſtaſted with that courſe of winning honour, they convert their mindes rather to doe ſomewhat for the better uniting of humane ſocietie, than for the diſſolving or diſturbing of the ſame. Another reaſon is, becauſe times of peace, for the moſt part drawing with them abundance of wealth, and*

fineneſſe

fineneſſe of cunning, doe draw alſo in further conſequence multitude of ſuits, and controverſies, and abuſes of law by evaſions and devices; which inconveniences in ſuch time growing more generall, doe more inſtantly ſolicite for the amendment of lawes to reſtraine and repreſſe them.

Your Majeſties reigne having beene bleſſed from the Higheſt with inward peace, and falling into an age wherein if ſcience bee increaſed, conſcience is rather decayed; and if mens wits be great, their wills be greater; and wherein alſo lawes are multiplied in number, and ſlackened in vigour and execution: It was not poſſible but that not onely ſuits in law ſhould multiply and increaſe (whereof a great part are alwayes unjuſt) but alſo that all the indirect courſes and practices to abuſe law and juſtice ſhould have been much attempted and put in ure, which no doubt had bred greater enormities, had they not by the royall policie of your Majeſtie, by the cenſure and fore-ſight of your Councell Table and Star-chamber, and by the gravitie and integritie of your Benches, beene repreſſed and reſtrained; for it may bee truely obſerved, that as concerning frauds in contracts, bargaines, and aſſurances, and abuſes of lawes by delayes, covins, vexations, and corruptions in Informers, Iurors, Miniſters of juſtice, and the like, there have beene ſundry excellent Statutes made in your Majeſties time, more in number, and more politicke in proviſion, than in any your Majeſties predeceſſors times.

But I am an unworthy witneſſe to your Majeſtie of an higher intention and project, both by that which

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was published by your Chancellor in full Parliament from your royall mouth, in the five and thirtieth of your happy reigne; and much more by that which I have beene since vouchsafed to understand from your Majesty, imparting a purpose for these many yeares infused into your Majesties breast, to enter into a generall amendment of the states of your lawes, and to reduce them to more brevity and certainty, that the great hollownesse and unsafety in assurances of lands and goods may be strengthened, the swarving penalties that lye upon many subjects removed, the execution of many profitable lawes revived, the Iudge better directed in his sentence, the Counseller better warranted in his Counsaile, the Student eased in his reading, the contentious Suitor that seeketh but vexation disarmed, and the honest Suitor that seeketh but to obtaine his right relieved; which purpose and intention, as it did strike mee with great admiration when I heard it, so it might be acknowledged to be one of the most chosen workes, and of the highest merit and beneficence towards the subject, that ever entred into the mind of any King; greater than wee can imagine, because the imperfections and dangers of the lawes are covered under the clemency and excellent temper of your Majesties government. And though there be rare presidents of it in government, as it commeth to passe in things so excellent, there being no president full in view but of Justinian, *yet I must say as* Cicero *said to* Cæsar, Nihil vulgatum te dignum videri potest; *and as it is no doubt a precious seed sowne in your Majesties heart by the hand of Gods divine Majesty, so I hope in the maturity of your Majesties owne*

time it will come up and beare fruit. But to returne thence whither I have beene carried: observing in your Majesty, upon so notable proofes and grounds, this disposition in generall of a prudent and royall regard to the amendment of your lawes, and having by my private labour and travell collected many of the grounds of the Common Lawes, the better to establish and settle a certaine sense of Law, which doth now too much waver in incertainty, I conceived the nature of the subject, besides my particular obligation, was such, as I ought not to dedicate the same to any other than to your sacred Maiesty; both because, though the collection bee mine, yet the lawes are yours; and because it is your Maiesties reigne that hath beene as a goodly seasonable spring-weather to the advancing of all excellent arts of peace. And so concluding with a prayer answerable to the present argument, which is, That God will continue your Maiesties reign in a happy and renowned peace, and that he will guide both your policy and armes to purchase the continuance of it with surety and honour, I most humbly crave pardon, and commend your Maiesty to the divine preservation.

Your sacred Majesties most humble
and obedient subject and servant,

FRANCIS BACON.

THE PREFACE.

I Hold every man a debtor to his profeſſion, from the which as men of courſe doe ſeeke to receive countenance and profit, ſo ought they of duty to endevour themſelves by way of amends, to be a help and ornament thereunto; this is performed in ſome degree by the honeſt and liberall practice of a profeſſion, when men ſhall carry a reſpect not to deſcend into any courſe that is corrupt and unworthy thereof, and preſerve themſelves free from the abuſes wherewith the ſame profeſſion is noted to bee infected: but much more is this performed if a man bee able to viſite and ſtrengthen the roots and foundation of the ſcience it ſelfe; thereby not onely gracing it in reputation and dignity, but alſo amplifying it in perfection & ſubſtance. Having therefore from the beginning come to the ſtudy of the lawes of this Realme, with a deſire no leſſe (if I could attaine unto it) that the ſame lawes ſhould be the better for my induſtry, than that my ſelf ſhould be the better for the knowledge of them: I doe not finde that by mine owne travell, without the help of authority, I can in any kinde conferre ſo profitable an addition unto that ſcience, as by collecting the rules and grounds, diſperſed throughout the body of the ſame lawes: for hereby no ſmall

light will be given in new cases, wherein the authorities doe square and vary, to confirme the Law, and to make it received one way, and in cases wherin the law is cleered by authority; yet nevertheleſſe to ſee more profoundly into the reaſon of ſuch judgements and ruled caſes, and thereby to make more uſe of them for the decision of other caſes more doubtfull; ſo that the incertainty of law, which is the principall and moſt juſt challenge that is made to the lawes of our nation at this time, will, by this new ſtrength laid to the foundation, be ſomewhat the more ſettled and corrected: Neither will the uſe hereof bee onely in deciding of doubts, and helping ſoundneſſe of judgment, but further in gracing of argument, in correcting unprofitable ſubtlety, and reducing the ſame to a more ſound and ſubſtantiall ſenſe of law, in reclaiming vulgar errors, & generally the amendment in ſome meaſure of the very nature and complexion of the whole law, and therefore the concluſions of reaſons of this kind are worthily and aptly called by a great Civilian *legum leges*, lawes of lawes, for that many *placita legum*, that is, particular and poſitive learnings of lawes do eaſily decline from a good temper of juſtice, if they bee not rectified and governed by ſuch rules.

Now for the manner of ſetting downe of them, I have in all points to the beſt of my underſtanding & foreſight applied my ſelfe not to that which might ſeeme moſt for the oſtentation of mine owne wit or knowledge, but to that which may yeeld moſt uſe and profit to the Students & profeſſors of our lawes.

And

And therefore, whereas theſe rules are ſome of them ordinary and vulgar, that now ſerve but for grounds and plaine ſongs to the more ſhallow and impertinent ſort of arguments: other of them are gathered and extracted out of the harmony and congruity of caſes, and are ſuch as the wiſeſt and deepeſt ſort of Lawyers have in judgement and uſe, though they bee not able many times to expreſſe and ſet them downe.

For the former ſort, which a man that ſhould rather write to raiſe an high opinion of himſelfe, than to inſtruct others, would have omitted, as trite and within every mans compaſſe; yet nevertheleſs I have not affected to neglect them, but have choſen out of them ſuch as I thought good: I have reduced them to a true application, limiting and defining their bounds, that they may not be read upon at large, but reſtrained to a point of difference: for as both in the Law, and other Sciences, the handling of queſtions by Common-place without aime or application is the weakeſt; ſo yet nevertheleſſe many cõmon principles & generalities are not to be contemned, if they be wel derived and deduced into particulars, & their limits and excluſions duely aſſigned: for there bee two contrary faults and extremities in the debating and ſifting out of the law, which may be beſt noted in two ſeverall manner of arguments: Some argue upon generall grounds, and come not neere the point in queſtion; others without laying any foundation of a ground or difference, doe looſely put caſes, which though they goe neere the point,

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yet being put so scattered, prove not, but rather serve to make the law appeare more doubtfull, than to make it more plaine.

Secondly, whereas some of these rules have a concurrence with the civill Roman law, & some others a diversity, & many times an opposition, such grounds which are common to our law and theirs I have not affected to disguise into other words than the Civilians use, to the end they might seem invented by me, and not borrowed or translated from them: No, but I tooke hold of it as a matter of greater Authority and Majesty to see and consider the concordance between the laws pend, and as it were dicted *verbatim* by the same reason: on the other side, the diversities between the civil Roman rules of law & ours, happening either when there is such an indifferency of reason, so equally ballanced, as the one law imbraceth one course, and the other the contrary, and both just after either is once positive and certaine, or where the lawes vary in regard of accommodating the law to the different considerations of estate, I have not omitted to set downe.

Thirdly, whereas I could have digested these rules into a certain method or order, which I know would have bin more admired, as that which would have made every particular rule through coherence and relation unto other rules seeme more cunning and deep, yet I have avoided so to do, because this delivering of knowledge in distinct and dis-joyned Aphorismes doth leave the wit of man more free to turne and tosse, and make use of that which is so delivered

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to more ſeverall purpoſes and applications; for wee ſee that all the ancient wiſdom and ſcience was wont to be delivered in that forme, as may be ſeene by the parables of *Solomon*, and by the Aphoriſmes of *Hippocrates*, and the morall verſes of *Theognis* and *Phocilides*, but chiefly the preſident of the Civill law, which hath taken the ſame courſe with their rules, did confirme me in my opinion.

Fourthly, whereas I know very wel it would have bin more plauſible & more currant, if the rules, with the expoſitions of them, had been ſet downe either in Latine or in Engliſh, that the harſhneſſe of the language might not have diſgraced the matter, and that Civilians, States-men, Schollers, and other ſenſible men might not have beene barred from them; yet I have forſaken that grace and ornament of them, and onely taken this courſe: The rules themſelves I have put in Latine, not purified further than the property of the termes of the law would permit, which language I choſe as the briefeſt to contrive the rules compendiouſly, the apteſt for memory, and of the greateſt authority and Majeſty to bee avouched and alledged in argument: and for the expoſitions and diſtinctions, I have retained the peculiar language of our law, becauſe it ſhould not bee ſingular among the bookes of the ſame ſcience, and becauſe it is moſt familiar to the Students and profeſſors thereof, and becauſe that it is moſt ſignificant to expreſs conceits of law; and to conclude, it is a language wherein a man ſhall not bee inticed to hunt after words, but matter; and for the excluding of any other than pro-

feſſed

fessed Lawyers, it was better manners to exclude them by the strangenesse of the language, than by the obscurity of the conceit, which is, as though it had been written in no private and retired language, yet by those that are not Lawyers would for the most part not have beene understood, or, which is worse, mistaken.

Fiftly, whereas I might have made more flourish and ostentation of reading, to have vouched the authorities, and sometimes to have enforced or noted upon them, yet I have abstained from that also, and the reason is, because I judged it a matter undue and prepostorous to prove rules and maximes; wherein I had the example of Mr *Littleton* and Mr *Fitzherbert*, whose writings are the institutions of the lawes of England, wherof the one forbeareth to vouch any authority altogether, the other never reciteth a booke, but when hee thinketh the case so weake of credit in it selfe, as it needs a surety; and these two I did far more esteem than Mr *Perkings* or Mr *Stamford* that have done the contrary: well will it appear to those that are learned in the lawes, that many of the cases are judged cases, either within the bookes or of fresh report, and most of them fortified by judged cases, and similitude of reason, though in some few cases I did intend expresly to weigh downe the authority by evidence of reason, and therein rather to correct the law, than either to sooth a received error, or by unprofitable subtlety, which corrupteth the sense of law, to reconcile contrarieties: for these reasons I resolved not to derogate from the authori-

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ty of the rules, by vouching of any of the authoritie of the cases, though in mine owne copy I had them quoted: for although the meanneſſe of mine owne perſon may now at firſt extenuate the authoritie of this collection, and that every man is adventrous to controule, yet ſurely according to *Gamduels* reaſon, if it be of weight, time will ſettle and authorize it; if it be light and weake, time will reprove it: So that, to conclude, you have here a worke without any glory of affected novelty, or of method, or of language, or of quotations and authorities, dedicated onely to uſe, and ſubmitted onely to the cenſure of the learned, and chiefly of time.

Laſtly, there is one point above all the reſt, I accompt the moſt materiall for making theſe reaſons indeed profitable and inſtructing, which is, that they be not ſet downe alone, like ſhort darke Oracles, which every man will be content ſtill to allow to be true, but in the meane time they give little light or direction; but I have attended them, a matter not practiced, no not in the Civill law to any purpoſe; and for want whereof indeed, the rules are but as proverbes, and many times plaine fallacies, with a cleere and perſpicuous expoſition, breaking them into caſes, and opening them with diſtinctions, and ſometimes ſhewing the reaſons above whereupon they depend, and the affinity they have with other rules. And though I have thus with as good diſcretion and fore-ſight as I could, ordered this work, and as I might ſay, without all colours or ſhewes husbanded it beſt to profit, yet nevertheleſſe not

wholly trusting to mine own judgement, having collected 300. of them, I thought good before I brought them all into form, to publish some few, that by the taste of other mens opinions in this first, I might receive either approbation in mine own course, or better advice for the altering of the other which remaine; for it is great reason that that which is intended to the profit of others, should be guided by the conceits of others.

Regulae.

1 IN jure non remota causa, sed proxima spectatur. fol. 1.

2 Non potest adduci exceptio ejusdem rei, cujus petitur dissolutio. 5

3 Verba fortius accipiuntur contra proferentem. 9

4 Quod sub certa forma concessum vel reservatum est, non trahitur ad valorem vel compensationem. 22

5 Necessitas inducit privilegium quoad jura privata. 25

6 Corporalis injuria non recipit æstimationem de futuro. 29

7 Excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus. 31

8 Æstimatio præteriti delicti ex post facto nunquam crescit. 33

9 Quod remedio destituitur ipsa re valet, si culpa absit. 34

10 Verba generalia restringantur ad habilitatem rei vel personæ. 43

11 Iura sanguinis nullo jure civili dirimi possunt. 44

12 Receditur a placitis juris potius quam injuria, ne delicta maneant impunita. 51

13 Non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram. 54

14 *Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens quæ sortiatur effectum interveniente novo actu.* 56

15 *In criminalibus sufficit generalis malitia intentionis cum facto paris gradus.* 59

16 *Mandata licita recipiunt strictam interpretationem, sed illicita latam & extensivam.* 60

17 *De fide & officio Iudicis non recipitur quæstio, sed de scientia, sive error sit Iudicis sive facti.* 62

18 *Persona conjuncta æquiparatur interesse proprio.* 65

19 *Non impedit clausula derogatoria, qua minus ab eadem potestate res dissolvantur a quibus constituuntur.* 67

20 *Actus inceptus, cujus perfectio pendet ex voluntate partium revocari potest, si autem pendet ex voluntate tertiæ personæ vel ex contingenti, revocari non potest.* 71

21 *Clausula vel dispositio inutilis per præsumptionem remotam vel causam ex post facto non fulcitur.* 74

22 *Non videtur consensum retinuisse, si quis ex præscripto minantis aliquid immutavit.* 81

23 *Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur.* 82

24 *Licita bene miscentur, formula nisi juris obstet.* 85

25 *Præsentia corporis tollit errorem nominis, & veritas nominis tollit errorem demonstrationis.* 86

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THE MAXIMES OF THE LAVV.

In jure non remota causa sed proxima spectatur.

IT were infinite for the law to judge the causes of causes, and their impulsions one of another, therefore it contenteth it selfe with the immediate cause, and judgeth of acts by that, without looking to any further degree.

As if an annuitie be granted *pro consilio impenso & impendendo*, and the grantee commit treason, whereby he is imprisoned, so that the grantor cannot have accesse unto him for his counsell, yet never- 6. H. 8. Dy.

vertheleſſe the annuitie is not determined by this *non feaſance*; yet it was the grantees act and default to commit the treaſon, whereby the imprisonment grew: But the law looketh not ſo farre, but excuſeth him, becauſe the not giving counſell was compulſary, and not voluntary, in regard of the impriſonment.

Litt. cap. 2. H. 4. 3. 26. H. 8. 2. So if a Parſon make a leaſe, and be deprived or reſigne, the ſucceſſors ſhall avoid the leaſe, and yet the cauſe of deprivation, and more ſtrongly of a reſignation moved from the party himſelfe; but the law regardeth not that, becauſe the admiſſion of the new Incumbent is the act of the Ordinary.

5 H. 7. 25. So if I be ſeiſed of an advowſon in groſſe, and an uſurpation be had againſt me, and at the next avoidance I uſurpe arere, I ſhall be remitted, and yet the preſentation, which is the act remote, is mine owne act: but the admiſſion of my Clerk, whereby the inheritance is reduced to me, is the act of the Ordinary.

So if I covenant with I.S. a ſtranger in conſideration of naturall love to my ſon, to ſtand ſeiſed to the uſe of the ſaid I.S. to the intent he ſhall infeoffe my ſonne; by this no uſe ariſeth to I.S. becauſe the law doth reſpect that there is no immediate conſideration between me and I.S.

So if I be bound to enter into a ſtatute before the Mayor of the Staple at ſuch a day, for the ſecurity of 100 l. and the obligee before the day accept of me a leaſe of an houſe in ſatisfaction, this is no plea in debt upon my obligation, and yet the end of that ſtatute

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was but ſecuritie of money: but becauſe the entring into this ſtatute it ſelfe, which is the immediate act whereunto I am bound, is a corporall act which lieth not in ſatisfaction, therefore the law taketh no conſideration that the remote intent was for money.

So if I make a feoffment in fee, upon condition that the feoffee ſhall infeoffe over, and the feoffee be diſſeiſed, and a diſcent caſt, and then the feoffee bind himſelfe in a ſtatute, which ſtatute is diſcharged before the recovery of the land, this is no breach of the condition, becauſe the land was never liable to the ſtatute, and the poſſibilitie that it ſhould be liable upon the recovery, the law doth not reſpect.

M. 40. & 41. El. Julius Winningtons caſe, ore report per le treſreverend Judge, le Snr Coke, lib. 2.

So if I enfeoffe two, upon condition to enfeoffe, and one of them take a wife, the condition is not broken, and yet there is a remote poſſibilitie that the jointenant may die, and then the feme is entitled to dower.

So if a man purchaſe land in fee-ſimple, and dye without iſſue, in the firſt degree the law reſpecteth dignitie of ſex and not proximitie, and therefore the remote heire on the part of the father ſhall have it before the neere heire on the part of the mother: but in any degree paramount the firſt the law reſpecteth not, and therefore the neere heire by the grandmother on the part of the father, ſhall have it before the remote heire of the grand-father on the part of the father.

This rule faileth in covenous acts, which though they be conveighed through many degrees and reaches, yet the law taketh heed to the corrupt beginning, and counteth all as one entire act.

As

As if a feoffment be made of lands held by Knights service to I. S. upon condition that within a certaine time he shall infeoffe I. D. which feoffment to I. D. shall be to the use of the wife of the first feoffor for her jointure, &c. this feoffment is within the statute of 32. *H.* 8. *nam dolus circuitu non purgatur.*

In like manner, this rule holdeth not in criminall acts, except they have a full interruption, because when the intention is matter of substance, and that which the law doth principally behold, there the first motive will be principally regarded, and not the last impulsion. As if I. S. of malice prepensed discharge a Pistoll at I. D. and misseth him, whereupon he throwes downe his Pistoll, and flyes, and I. D. pursueth him to kill him, whereupon he turneth and killeth I. D. with a Dagger; if the law should consider the last impulsive cause, it should say, that it was in his owne defence; but the law is otherwise, for it is but a pursuance and execution of the first murtherous intent.

44 Ed. 3. But if I. S. had fallen downe his Dagger drawne, and I. D. had fallen by haste upon his Dagger, there I. D. had been *felo de se*, and I. S. shall goe quit.

Also you may not confound the act with the execution of the act; nor the entire act with the last part, or the consummation of the act.

Lit. cap. de disc. For if a disseisor enter into religion, the immediate cause is from the party, though the discent be cast in law: but the law doth but execute the act which the party procureth, and therefore the discent shall not bind, *& sic è converso.*

If a leaſe for yeeres be made rendring a rent, and the leſſee make a feoffement of part, and the leſſor enter, the immediate cauſe is from the law in reſpect of the forfeiture, though the entry be the act of the party; but that is but the purſuance and putting in execution of the title which the law giveth, and therefore the rent or condition ſhall be appointed. 21. Eliz. 24. H. 8. fo. 4. Dy.

So in the binding of a right by a diſcent, you are to conſider the whole time from the diſſeiſin to the diſcent caſt, and if at all times the perſon be not priviledged, the diſcent bindes.

And therefore if a feme covert bee diſſeiſed, and the Baron dieth, and ſhe taketh a new husband, and then the diſcent is caſt: or if a man that is not *infra* 4. *Maria*, bee diſſeiſed, and hee returne into England, and goe over ſea againe, and then a diſcent is caſt, this diſcent bindeth becauſe of the *interim* when the perſons might have entered, and the law reſpecteth not the ſtate of the perſon at the laſt time of the diſcent caſt, but a continuance from the very diſſeiſed to the diſcent. 9. H. 7. 24. 3. & 4. P. & M. Dr. 143.

So if Baron and feme bee, and they joyne in a feoffement of the wives land rendring a rent, and the Baron dye, and the feme take a new husband before any rent day, and hee accepteth the rent, the feoffment is affirmed for ever.

Non poteſt adduci exceptio eiuſdem rei, cuius petitur diſſolutio. *Regula* 2.

IT were impertinent and contrary in it ſelfe, for the law to allow of a plea in barre of ſuch matter as is

to be defeated by the ſame ſuit; for it is included, otherwiſe a man ſhould never come to the end and effect of his ſuit, but be cut off in the way.

And therefore if tenant in taile of a mannour, whereunto a villeine is regardant, diſcontinue and dye, and the right of the entaile deſcend to the villeine himſelfe, who brings a *formedon*, and the diſcontinuee pleadeth villenage, this is no plea, becauſe the deveſting of the mannor, which is the intention of the ſuit, doth include this plea, becauſe it determineth the villenage.

So if tenant in ancient demeſne, bee diſſeiſed by the Lord, whereby the ſeigniory is ſuſpended, and the diſſeiſee bring his aſſize in the Court of the Lord, Francke fee is no plea, becauſe the ſuite is brought to undoe the diſſeiſſ. and ſo to revive the ſeigniory in ancient demeſne.

7.H.4.39. 7.H.6.44. So if a man bee attainted and executed, and the heire bring a writ of error upon the attaindor, and the corruption of blood by the ſame attaindor bee pleaded to interrupt his conveighing in the ſame writ of error, this is no plea, for then hee were without remedy ever to reverſe the attaindor.

So if tenant in taile diſcontinue for life rendring a rent, and the iſſue brings a *formedon*, and the warranty of his anceſtor with aſſets bee pleaded againſt him, and the aſſets is laid to be no other but his reverſion with the rent, this is no plea, becauſe the *formedon* which is brought to undoe this diſcontinuance doth incluſively undoe this new reverſion in fee with the rent thereunto annexed.

38.Ed.3.32.

But

But whether this rule may take place where the matter of plea is not to bee avoided in the ſame ſuite but in another ſuit, is doubtfull; and I rather take the law to be that this rule doth extend to ſuch caſes, for otherwiſe the party were at a miſchief, in reſpect the exceptions and bars might be pleaded croſſe either of them in the contrary ſuit, and ſo the party altogether prevented & intercepted to come by his right.

So if a man be attainted by two ſeverall attaindors, and there is error in them both, there is no reaſon but that there ſhould be a remedy open for the heire to reverſe thoſe attaindors being erroneous, as well if they be twenty as one.

And therefore if in a writ of error brought by the heire of one of them, the attaindor ſhould be a plea peremptorily, and ſo again if in error brought of that other, the former ſhould be a plea, theſe were to exclude him utterly of his right; and therefore it ſhould be a good replication to ſay that hee hath a writ of error depending of that alſo, and ſo the Court ſhall proceed; but no judgment ſhall bee given till both pleas be diſcuſſed: and if either plea be found without error, there ſhall bee no reverſall either of the one or of the other: and if he diſcontinue either writ, then ſhall it be no longer a plea: and ſo of ſeverall outlawries in a perſonall action.

And this ſeemeth to me more reaſonable, than that generally an outlawry or an attaindor ſhould be no plea in a writ of error brought upon a divers outlawry or an attaindor, as 7. *H.* 4. and 7. *H.* 6. ſeeme to hold, for that is a remedy too large for the

miſchiefe; for there is no reaſon but if any of the outlawries or attainders bee indeed without errour, but it ſhould bee a peremptory plea to the perſon in a writ of error as well as in any other action.

But if a man levie a fine S^r *conuſaunce de droit come ceo que il ad de ſon done*, and ſuffer a recovery of the ſame lands, and there bee error in them both, hee cannot bring error firſt of the fine, becauſe by the recovery his title of error is diſcharged and releaſed in law *incluſive*, but hee muſt begin with the error upon the recovery (which he may do, becauſe a fine executed barreth no titles that accrue *de priſne temps* after the fine levied) and ſo reſtore himſelfe to his title of error upon the fine: but ſo it is not in the former caſe of the attainder; for a writ of errour to a former attainder is not given away by a ſecond, except it be by expreſſe words of an act of Parliament, but onely it remaineth a plea to his perſon while he liveth, and to the conveyance of his heire after his death.

But if a man levie a fine where he hath nothing in the land, which inureth by way of concluſion onely, and is executory againſt all purchaſes and new titles which ſhall grow to the Conuſor afterwards, and he purchaſe the land, and ſuffer a recovery to the Conuſee, and in both fine and recovery, there is error. This fine is *Ianus bifrons*, and will looke forward, and barre him of his writ of error brought of the recovery, and therefore it will come to the reaſon of the firſt caſe of the attainder, that he muſt reply that he hath a writ alſo depending of the ſame fine, and ſo demand judgment.

To

To returne to our first purpose, like law it is if tenant in taile of two acres make two severall discontinuances to severall persons for life rendring a rent, and bringeth a *formedon* of both, and in the *formedon* brought of white acre the reversion and rent reserved upon blacke acre is pleaded, and so contrary. I take it to be a good replication, that he hath a *formedon* also upon that depending, whereunto the tenant hath pleaded the discent of the reversion of white acre, and so neither shall be a barre; and yet there is no doubt but if in a *formedon* the warranty of tenant in taile with assets be pleaded, it is no replication for the issue to say, that a *Pracipe* dependeth brought by I.S. to evict the assets.

But the former case standeth upon the particular reason before mentioned.

Verba fortius accipiuntur contra proferentem. Reg. 3.

THis rule, that a mans deeds and his words shall bee taken stronglieſt against himselfe, though it be one of the most common grounds of the law, it is notwithstanding a rule drawne out of the depth of reason; for first it is a Schoole-master of wisdome and diligence in making men watchfull in their owne businesse, next it is author of much quiet and certainty, and that in two sorts: first, because it favoureth acts and conveyances executed, taking them still beneficially for the grauntees and possessours: and secondly, because it makes an end of many questions and doubts about construction of words: for if

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the labour were onely to picke out the intention of the parties, every Judge would have a ſeverall ſenſe, whereas this rule doth give them a ſway to take the law more certainely one way.

But this rule, as all other which are very generall, is but a ſound in the aire, and commeth in ſometimes to helpe and make up other reaſons without any great inſtruction or direction, except it be duely conceived in point of difference, where it taketh place, and where not; and firſt we will examine it in grants, and then in pleadings.

The force of this rule is in three things, in ambiguity of words, in implication of matter, and deducing or qualifying the expoſition of ſuch grants as were againſt the law, if they were taken according to their words.

2.R.3.18. 21.H.7.29. And therefore if I.S. ſubmit himſelfe to arbitrement of all actions and ſuites betweene him and I. D. and I. N. it reſts ambiguous whether the ſubmiſſion ſhall bee intended collective of joint actions onely, or diſtribute of ſeverall actions alſo; but becauſe the words ſhall bee taken ſtrongleſt againſt I.S. that ſpeakes them, it ſhall bee underſtood of both: for if I. S. had ſubmitted himſelfe to arbitrement of all actions and ſuits which hee hath now depending, except it bee ſuch as are betweene him and I. D. and I. N. now it ſhall bee underſtood collective onely of joint actions, becauſe in the other caſe at large conſtruction was hardeſt againſt him that ſpeakes, and in this caſe ſtrict conſtruction is hardeſt.

So

So if I graunt ten pounds rent to Baron and feme, and if the Baron dye that the feme ſhall have three pounds rent, becauſe theſe words reſt ambiguous whether I intend three pounds by way of encreaſe, or three pounds by way of reſtraint and abatement of the former rent of ten pounds, it ſhall bee taken ſtrongſt againſt me that am the grauntor, that it is 3. pounds addition to the ten: but if I had let land to Baron and feme for three lives, reſerving ten pounds *per annum*, and if the Baron dye reſerving three pounds, this ſhall bee taken contrary to the former caſe, to abridge my rent onely to three pounds. 8. Aſſ p. 10.

So if I demiſe *omnes boſcos meos in villa de dale* for yeares, this paſſeth the ſoile, but if I demiſe all my lands in dale *exceptis boſcis*, this extendeth to the trees onely and not to the ſoile. 14. H. 8. 28. H. 8. Dr. 19.

So if I ſow my lands with corne, and let it for yeares, the corne paſſeth to my leſſee, if I except it not; but if I make a leaſe for life to I.S. upon condition that upon requeſt hee ſhall make mee a leaſe for yeares, and I.S. ſoweth his ground, and then I make requeſt, I.S. may well make mee a leaſe excepting his corne, and not breake the condition.

So if I have free warren in mine owne hand, and let my land for life, not mentioning the warren, yet the leſſee by implication ſhall have the warren diſcharged and extract during his leaſe: but if I let the land *una cum libera warrenna*, excepting white acre, there the warren is not by implication reſerved unto me either to be injoyed or extinguiſhed, 8. H. 7. 32. H. 6.

but

but the leaſee ſhall have warren againſt me in white acre.

29.Aſſ.pl.10. So if I. S. hold of mee by fealty and rent onely, and I grant the rent, not ſpeaking of the fealty, yet the fealty by implication ſhall paſſe, becauſe my grant ſhall be taken ſtrongly as of a rent ſervice, and not of a rent ſecke.

44 Ed.3.19. Otherwiſe had it beene if the ſeigniory had beene by homage, fealty, and rent, becauſe of the dignity of the ſervice, which could not have paſſed by intendment by the grant of the rent: but if I be ſeiſed

26.aſſ.pl.66. of the mannor of dale in fee, whereof I.S. holds by fealty and rent, and I grant the mannor, excepting the rent, the fealty ſhall paſſe to the grantee, and I.S. ſhall have but a rent ſecke.

So in grants againſt the law, if I give land to I.S. and his heires males, this is a good fee-ſimple, which is a larger eſtate than the words ſeeme to intend, and the word (males) is void. But if I make a gift entaile reſerving a rent to me and the heires of my body, the words (*of my body*) are not void, and to leave it a rent in fee-ſimple; but the word (heires) and all are void, and leaves but a rent for life, except that you will ſay, it is but a limitation to any my heire in fee-ſimple which ſhall be heire of my body; for it cannot be a rent entaile by reſervation.

But if I give land with my daughter in francke marriage, the remainder to I. S. and his heires, this grant cannot be good in all the parts, according to the words: for it is incident to the nature of a gift in francke marriage, that the donee hold it of the donor,

donor, and therefore my deed shall bee taken so strongly against my selfe, * that rather than the remainder shall be void, the francke marriage though it be first placed in the deed shall be void as a franck marriage.

But if I give land in francke marriage reserving to mee and my heires ten pounds rent, now the franck marriage stands good and the reservation is void, because it is a limitation of a benefit to my selfe, and not to a stranger.

So if I let White Acre, Blacke Acre, and Greene Acre to I. S. excepting White Acre, his exception is voide, because it is repugnant; but if I let the three Acres aforesaid, rendring twentie shillings rent, *viz.* for White Acre ten shillings, and for Blacke Acre ten shillings, I shall not distraine at all in Greene Acre, but that shall be discharged of my rent.

So if I graunt a rent to I. S. and his heires out of my mannour of Dale, *& obligo manerium & omnia bona & catalla mea super manerium prædictum existentia ad distringendum per Balivum Domini Regis:* this limitation of the distresse to the Kings Bailiffe is void, and it is good to give a power of distresse to I. S. the grauntee and his Bailiffes.

But if I give land intaile *tenend' de capitalibus Dominis per redditum viginti solidorum & fidelitatem:* this limitation of tenure to the Lord is voide, and it shall not bee good, as in the other case, to make a reservation of twenty shillings good unto my selfe, but it shall be utterly voide as if no reserva-

* Quære car le ley semble dēe le contrary, entant que in un grant quant lun part del fait ne poit estroier ove lauter le dart: serra void, auterment in un devise & accordant fuit lopin: de Sur Anderson & Owen Just: contra Walmesley Just: P. 40. Eliz. in le case de Countesse de Warwick & Sur Barkley in com. banco. 4. H. 6. 22. 26. ass. pl. 66. 46. Ed. 3. 18.

2. Ed. 4. 5.

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tion at all had been made; and if the truth be that I that am the donor hold of the Lord paramount by ten ſhillings onely, then there ſhall be ten ſhillings onely reſerved upon the gift entaile as for ovelty.

21. Ed. 3. 49. 31. & 32. H. 8. Dyer 46. Plow. fo. 37. 35. H. 6. 34.

So if I give land to I.S. and the heires of his body, and for default of ſuch iſſue *quod tenementum prædictum revertatur ad I. N.* yet theſe words of reſervation will carry a remainder to a ſtranger. But if I let white acre to I. S. excepting ten ſhillings rent, theſe words of exception to mine owne benefit ſhall never inure to words of reſervation.

But now it is to be noted, that this rule is the laſt to be reſorted to, and is never to be relyed upon but where all other rules of expoſition of words faile; and if any other come in place, this giveth place. And that is a point worthy to be obſerved generally in the rules of the law, that when they encounter and croſſe one another in any caſe, it be underſtood which the law holdeth worthier, and to be preferred; and it is in this particular very notable to conſider, that this being a rule of ſome ſtrictneſſe and rigour, doth not as it were its office, but in abſence of other rules which are of more equity and humanity; which rules you ſhall afterwards find ſet down with their expoſitions and limitations.

But now to give a taſte of them to this preſent purpoſe, it is a rule that generall words ſhall never be ſtretched too farre in intendment, which the Civilians utter thus: *Verba generalia reſtringuntur ad habilitatem perſonæ, vel ad aptitudinem rei.*

14. Aſſ. pl. 25. Therefore if a man grant to another Common *in-*

tra

tra metas & bundas villæ de dale, and part of the ville in his ſeverall, and part his waſte and Common; the grauntee ſhall not have Common in the Severall, and yet this is the ſtrongeſt expoſition againſt the grantor.

So it is a rule, *Verba ita ſunt intelligenda, ut res magis valeat quam pereat* : and therefore if I give land to I. S. and his heires, *reddend. quinque libras annuatim* to I. D. and his heires, this implies a condition to me that am the grantor; yet it were a ſtronger expoſition againſt mee, to ſay the limitation ſhould be void, and the feoffement abſolute. Lit. cap. cond.

So it is a rule, that the law will not intend a wrong, which the Civilians utter thus: *Ea eſt accipienda interpretatio, quæ vitio caret.* And therefore if the executor of I. S. grant *omnia bona & catalla ſua*, the goods which they have as executors will not paſſe, becauſe *non conſtat* whether it may be a devaſtation, and ſo a wrong; and yet againſt the treſpaſſer that taketh them out of their hand, they ſhall declare *quod bona ſua cepit.* 10. Ed. 4. 1.

So it is a rule, that words are ſo to be underſtood, that they worke ſomewhat, and be not idle and frivolous: *verba aliquid operari debent, verba cum effectu ſunt accipienda.* And therefore if I buy and ſell you the fourth part of my mannor of dale, and ſay not in how many parts to be divided, this ſhall be conſtrued foure parts of five, and not of 6. nor 7. &c. becauſe that it is the ſtrongeſt againſt me; but on the other ſide, it ſhall not be intended foure parts of foure parts, or the whole or foure quarters; and yet that

were ſtrongeſt of all, but then the words were idle and of none effect.

3.H. 6. 20. So it is a rule, *Divinatio non interpretatio eſt, quæ omnino recedit à litera:* and therefore if I have a fee farme rent iſſuing out of white acre of ten ſhillings, and I reciting the ſame reſervation doe grant to I. S. the rent of five ſhillings *percipiend' de reddit' predict' & de omnibus terris & tenementis meis in dale*, with a clauſe of diſtreſſe, although there be atturnement, yet nothing paſſeth out of my former rent, and yet that were ſtrongeſt againſt me to have it a double rent, or grant of part of that rent with an enlargement of a diſtreſſe in the other land, but for that it is againſt the words, becauſe *copulatio verborum indicat acceptionem in eodem ſenſu*, and the word *de* (*anglice* out of) may be taken in two ſenſes, that is, either as a greater ſumme out of a leſſe, or as a charge out of land, or other principall intereſt; and that the coupling of it with lands and tenements, *viz.* I reciting that I am ſeiſed of ſuch a rent of ten ſhillings, doe grant five ſhillings *percipiend' de eodem reddit'* it is good enough without atturnement, becauſe *percipiend' de &c.* may well be taken for *parcella de &c.* without violence to the words, but if it had been *de reddit' predict'* although I.S. be the perſon that payeth me the foreſaid rent of ten ſhillings, yet it is void, and ſo it is of all other rules of expoſition of grants when they meet in oppoſition with this rule they are preferred.

Now to examine this rule in pleadings as we have done in grants, you ſhall finde that in all imperfecti-

ons of pleadings, whether it bee in ambiguitie of words and double intendments, or want of certaintie and averments, the plea ſhall bee ſtrictly and ſtrongly againſt him that pleads.

For ambiguitie of words, if in a writ of entry upon diſſeiſin, the tenant pleads jointenancy with with I. S. of the gift and teoffement of I. D. judgement *de brieſe*, the demandant ſaith that long time before I. D. any thing had, the demandant himſelfe was ſeiſed in fee *quouſque predict' I. D. ſuper poſſeſſionem ejus intravit*, and made a joint teoffement, whereupon he the demandant re-entred, and ſo was ſeiſed untill by the defendant alone hee was diſſeiſed; this is no plea, becauſe the word *intravit* may bee underſtood either of a lawfull entry, or of a tortious, and the hardeſt againſt him ſhall be taken, which is, that it was a lawfull entry, therefore he ſhould have alledged precilely that I. D. *diſſeiſivit*.

So upon ambiguities that grow by reference, If an action of debt be brought againſt I. N. and I. P. Sheriffes of London upon an eſcape, and the plaintiffe doth declare upon an execution by force of a recovery in the priſon of Ludgate *ſub cuſtodia I. S. & I. D.* then Sheriffes in 1. K. H. 8. and that he ſo continued *ſub cuſtodia I. B. & I. G.* in 2. King H. 8. and ſo continued *ſub cuſtodia I. N. & I. L.* in 3. K. H. 8. and then was ſuffered to eſcape: I. N. and I. L. plead that before the eſcape ſuppoſed at ſuch a day *anno ſuperius in narratione ſpecificato* the ſaid I. D. and I. S. *ad tunc vicecomites* ſuffered

3. Ed. 6. Dy. 66.

red him to eſcape, this is no good plea, becauſe there be three yeeres ſpecified in the declaration, and it ſhall be hardeſt taken that it was 1. or 3. H. 8. when they were out of office: and yet it is neerly induced by the *ad tunc vicecomites*, which ſhould leave the intendment to be of that yeere in which the declaration ſuppoſeth that they were Sheriffes, but that ſufficeth not, but the yeare muſt be alledged in fact, for it may be miſ-laid by the Plaintiffe, and therefore the Defendants meaning to diſcharge themſelves by a former eſcape, which was not in their time, muſt alledge it preciſely.

26. H. 8. For incertainty of intendment, if a warranty collaterall be pleaded in barre, and the plaintiffe by replication to avoid the warranty, ſaith, that he entred upon the poſſeſſion of the defendant, *non conſtat* whether this entry was in the life of the anceſter, or after the warranty attached: and therefore it ſhall be taken in hardeſt ſenſe, that it was after the warranty deſcended, if it be not otherwiſe averred.

38. H. 6. 18. 39. H. 6. 5. For impropriety of words, if a man plead that his anceſtor died by proteſtation ſeiſed, and that I.S. abated, &c. this is no plea, for there cannot be an abatement except there be a dying ſeiſed alledged in fact, and an abatement ſhall not be improperly taken for diſſeiſin in pleading *car parols ſont pleas*.

For repugnancy, if a man in avowry declare that he was ſeiſed in his demeſne as of fee of white acre, and being ſo ſeiſed did demiſe the ſaid white acre to I. S. *habendum* the moitie for 21. yeares from the date of the deed, the other moitie from the ſurrender,

der, expiration, or determination of the eſtate of I. D. *qui tenet prædict' medietatem ad terminum vitæ ſuæ reddend'* 40. s. rent, this declaration is inſufficient, becauſe the ſeiſin that he hath alledged in himſelfe in his demeſne as of fee in the whole, and the ſtate for life of a moity are repugnant, and it ſhall not be cured by taking the laſt which is expreſſed to controll the former, which is but generall and formall, but the plea is naught, and yet the matter in law had been good to have intituled him to have diſtrained for the whole rent.

But the ſame reſtraint followes this rule in pleading that was before noted in grants: for if the caſe be ſuch as falleth within another rule of pleading, this rule may not be urged.

And therefore it is a rule that a barre is good to a common intent, though not to every intent. As, if a debt be brought againſt five executors, and three of them make default, and two appeare and plead in barre a recovery had againſt them two of 300 l. and nothing in their hands over and above that ſumme. If this barre ſhould be taken ſtronglieſt againſt them, it ſhould be intended that they might have abated the firſt ſuit, becauſe the other three were not named, and ſo the recovery not duely had againſt them; but becauſe of this other rule the barre is good: for that the more common intent will ſay that they two did onely adminiſter, and ſo the action well conſidered, rather than to imagine, that they would have loſt the benefit and advantage of abating the writ. 9. Ed. 4. 4. Ed. 6. Plow.

So there is another rule, that in pleading a man ſhall

ſhall not diſcloſe that which is againſt himſelfe: and therefore if it be matter that is to be ſet forth on the other ſide, then the plea ſhall not be taken in the hardeſt ſenſe, but in the moſt beneficiall, and to be left unto the contrary party to alledge.

28. H. 8. Dy. fol. 17. And therefore if a man be bound in an obligation, that if the feme of the obligee doe deceaſe before the feaſt of Saint John the Baptiſt, which ſhall be in the yeere of our Lord God 1598. without iſſue of her body by her husband lawfully begotten then living, that then the bond ſhall be void, and in debt brought upon this obligation the defendants plead that the feme died before the ſaid feaſt without iſſue of her body then living: if this plea ſhould be taken ſtronglieſt againſt the defendant, then ſhould it be taken that the feme had iſſue at the time of her death, but this iſſue died before the feaſt; but that ſhall not be ſo underſtood, becauſe it makes againſt the defendant, and it is to be brought in of the plaintiffes ſide, and that without traverſe.

So if in a detinue brought by a feme againſt the executors of her husband for her reaſonable part of the goods of her husband, and her demand is of a moitie, and ſhee declares upon the cuſtome of the Realme by which the feme is to have a moitie, if no iſſue be had betweene her and her husband, and the third part if there be iſſue had, and declareth that her husband dieth without iſſue had between them; if this count ſhould be hardlieſt conſtrued againſt the party, it ſhould be intended that her husband had iſſue by another wife, though not by her, in which

caſe

case the feme is but to have the third part likewise; but that shall not be so intended, because it is matter of reply to be shewed of the other side.

And so it is of all other rules of pleadings, these being sufficient not only for the exact expounding of these other rules, but *obiter* to shew how this rule which wee handle is put by when it meets with any other rule.

As for Acts of Parliament, Verdicts, Judgements, &c. which are not words of parties: in them this rule hath no place at all, neither in devises and wils upon severall reasons; but more especially it is to be noted, that in evidence it hath no place, which yet seemes to have some affinity with pleadings; specially when demurrer is joyned upon the evidence.

And therfore if land be given by will by H.C. to his son I.C. and the heires males of his body begotten; the remainder to F.C. and the heirs males of his body begotten; the remainder to the heires males of the body of the devisor; the remainder to his daughter S.C. and the heires of her body, with a clause of perpetuity, and the question comes upon the point of forfeiture in an assize taken by default, and evidence is given, and demurrer upon evidence, and in the evidence given to maintaine the entry of the daughter upon a forfeiture, it is not set forth nor averred that the devisor had no other issue male, yet the evidence is good enough, and it shall be so intended; and the reason hereof cannot bee, because a Jury may take knowledge of matters not within the evidence, and the Court contrariwise cannot take knowledge of any matters not within the pleas: for it is cleere, that

if the evidence had bin altogether remote, and not proving the issue, there, although the Jury might find it, yet a demurrer might well be taken upon the evidence.

But if I take the reason of difference to be between pleadings, which are but openings of the case, & evidences which are the proofs of an issue, for pleadings being but to open the verity of the matter in fact indifferently on both parts, hath no scope and conclusion to direct the construction & intendment of them, and therefore must bee certaine; but in evidence and proofs the issue which is the state of the question and conclusion shall encline and apply all the proofes as tending to that conclusion.

Another reason is, that pleadings must be certain, because the adverse party may know whereto to answer, or else he were at a mischiefe, which mischiefe is remedied by a demurrer; but in evidence if it bee short, impertinent, or incertaine, the adverse party is at no mischiefe, because it is to bee thought that the Jury will passe against him; yet nevertheless the Jury is not compellable to supply the defect of evidence out of their owne knowledge, though it bee in their liberty so to doe, therefore the law alloweth a demurrer upon evidence also.

Reg. 4. *Quod sub certa forma concessum vel reservatum est non trahitur ad valorem vel compensationem.*

THe law permitteth every man to part with his own interest, and to qualifie his owne grant as it pleaseth himself, and therfore doth not admit any allowance or recompence if the thing be not taken as it is granted.

So

So in all profits *a prender*, if I grant Cõmon for ten beasts, or ten loads of wood out of my copps, or ten loads of hay out of my meads to be taken for three yeeres, he shall not have Common for 30. beasts, or 30. loads of wood or hay the third yeare if hee forbeare for the space of two yeares, here the time is certaine and precise. 17. H. 6. 10.

So if the place be limited, or if I grant Estovers to be spent in such a house, or stone towards the reparation of such a Castle, although the grantee doe burne of his fuell and repaire of his owne charge, yet he can demand no allowance for that he took it not.

So if the kinde be specified, as if I let my Park reserving to my selfe all the deere and sufficient pasture for them, if I doe decay the game whereby there is no Deere, I shall not have quantity of pasture answerable to the feed of so many Deere as were upon the ground when I let it, but am without any remedy except I repleniſh the ground againe with Deere.

But it may be thought that the reason of these cases is the default and laches of the grantor, which is not so.

For put the case that the house where the Estovers should be spent be overthrowne by the act of God, as by tempest, or burnt by the enemies of the King, yet there is no recompence to be made.

And in the strongest case where it is in default of the grantor, yet he shall make void his owne graunt rather than the certain form of it should be wrested to an equity or valuation.

As if I grant Common *ubicunq; averia mea ierint*,

the Commoner cannot otherwiſe entitle himſelfe, except that he averre that in ſuch grounds my beaſts have gone and fed, and if I never put in any, but occupy my grounds otherwiſe, he is without remedy; but if I put in, and after by poverty or otherwiſe I deſiſt, yet the Commoner may continue; contrariwiſe, if the words of the grant had been *quandocunque averia mea ierint*, for there it depends continually upon the putting in of my beaſts, or at leaſt the generall ſeaſons when I put them in, not upon every houre or moment.

But if I grant *tertiam advocationem* to I. S. if hee neglect to take his turne *ea vice*, hee is without remedy: but if my wife bee before intituled to Dower, and I dye, then my heire ſhall have two preſentments, and my wife the third, and my grauntee ſhall have the fourth; and it doth not impugne this rule at all, becauſe the graunt ſhall receive that conſtruction at the firſt that it was intended ſuch an avoidance as may bee taken and enjoyed: as if I graunt
29.H.8.Dy.38. *proximam advocationem* to I.D. and then graunt *proximam advocationem* to I. S. this ſhall bee intended the next to the next, which I may lawfully grant or diſpoſe. *Quære.*

But if I grant *proximam advocationem* to I. S. and I. N. is Incumbent, and I grant by preciſe words, *illam advocationem, quam poſt mortem, reſignationem, tranſlationem, vel deprivationem I. N. immediate fore contigerit*, now the grant is meerly void, becauſe I had granted that before, and it cannot bee taken againſt the words.

Neceſſitas inducit privilegium quoad iura privata. *Regula 5.*

THe Law chargeth no man with default where the act is compulſory, and not voluntary, and where there is not a conſent and election; and therefore if either there bee an impoſſibility for a man to doe otherwiſe, or ſo great a perturbation of the judgment and reaſon as in preſumption of law mans nature cannot overcome, ſuch neceſſity carrieth a priviledge in it ſelfe. 4. Ed. 6. cond.

Neceſſity is of three ſorts, neceſſity of conſervation of life, neceſſity of obedience, and neceſſity of the act of God or of a ſtranger. Stamf.

Firſt of conſervation of life, If a man ſteale viands to ſatisfie his preſent hunger, this is no felony nor larceny. Stamf.

So if divers bee in danger of drowning by the caſting away of ſome boat or barge, & one of them get to ſome plancke, or on the boats ſide to keepe himſelfe above water, and another to ſave his life thruſt him from it, whereby he is drowned; this is neither *ſe defendendo* nor by miſadventure, but juſtifiable.

So if divers felons bee in a Jaile, and the Jaile by caſualty is ſet on fire, whereby the priſoners get forth, this is no eſcape, nor breaking of priſon. Cond. 13. 6. per Brooke. 15. H. 7. 2 per Keble.

So upon the Statute, that every Merchant that ſetteth his merchandize on land without ſatisfying the cuſtomer or agreeing for it (which agreement is conſtrued to be incertainty) ſhal forfeit his merchandize, and it is ſo that by tempeſt a great quantity of the merchan- 14. H. 7. 29. per Read. 4. Ed. 6. pl. 4. Ed. 6. 20. condic.

merchandize is caſt over board, whereby the Merchant agrees with the Cuſtomer by eſtimation, which falleth out ſhort of the truth, yet the overquantity is not forfeited; where note that neceſſity diſpenſeth with the direct letter of a ſtatute law.

Lit.pl.4.19. 12.H.4.20. 14.H.4.30. B.38.H.6.11. 28.H.6.8. 39.H.6.50. So if a man have right to land, and doe not make his entry for terrour of force, the law allowes him a continuall claime, which ſhall bee as beneficiall unto him as any entry; ſo ſhall a man ſave his default of appearance by *cretain de eau*, and avoide his debt by *dureſſe*, whereof you ſhall finde proper caſes elſewhere.

Stamf.26.2. Ed.3.160. Cor. Fitzh. The ſecond neceſſity is of obedience, and therefore where Baron and Feme commit a felony, the Feme can neither be principal nor acceſſary, becauſe the law intends her to have no will, in regard of the ſubjection and obedience ſhe owes to her husband.

So one reaſon among others why Embaſſadours are uſed to bee excuſed of practiſes againſt the State where they reſide, except it be in point of conſpiracy, which is againſt the law of nations and ſociety, is, becauſe *non conſtat* whether they have it *in mandatis*, and then they are excuſed by neceſſity of obedience.

So if a warrant or precept come from the King to fell wood upon the ground whereof I am tenant for life or for yeeres, I am excuſed in waſte.

B.42.Ed.3.6. B.Waſt 31. 42.Ed.3.6. 19.Ed.3. per Th.Fitz.Waſt 30. The third neceſſity is of the act of God, or of a ſtranger, as if I bee particular tenant for yeares of a houſe, and it be overthrowne by grand tempeſt, or thunder & lightning, or by ſudden floods, or by invaſion of enemies, or if I have belonging unto it ſome

Cot-

Cottage which hath beene infected, whereby I can procure none to inhabite them, no workeman to repaire them, and so they fall down, in all these cases I am excused in waste: but of this last learning when and how the act of God and strangers doe excuse, there be other particular rules. 32.Ed.3. Fitzh.Wast. 105. 44.Ed.3.31.

But then it is to be noted, that necessity priviledgeth only *quoad iura privata*, for in all cases if the act that should deliver a man out of the necessity be against the Cōmonwealth, necessity excuseth not: for *privilegium non valet contra rempublicam:* and as another saith, *necessitas publica maior est quam privata:* for death is the last and farthest point of particular necessity, and the law imposeth it upon every subject, that hee preferre the urgent service of his Prince and Country before the safety of his life: As if in danger of tempest those that are in the ship throw over other mens goods, they are not answerable: but if a man be cōmanded to bring Ordnance or munitiō to relieve any of the Kings towns that are distressed, then he cannot for any danger of tempest justifie the throwing of them overboard, for there it holdeth which was spoken by the Romane, when he alledged the same necessity of weather to hold him from imbarquing, *Necesse est ut eam, non ut vivam.* So in the case put before of husband and wife, if they joyne in committing treason, the necessity of obedience doth not excuse the offence as it doth in felony, because it is against the Commonwealth. 13.H.8.16.per Shelley.

So if a fire be taken in a street, I may justifie the pulling down of the wall or house of another man to 12.H.8.10. per Brooke. 22.Ass.pl.56.

save

ſave the row from the ſpreading of the fire; but if I be aſſailed in my houſe in a City or Towne, and diſtreſſed, and to ſave my life I ſet fire on mine owne houſe, which ſpreadeth and taketh hold upon other houſes adjoyning, this is not juſtifiable, but I am ſubject to their action upon the caſe, becauſe I cannot reſcue mine own life by doing any thing which is againſt the Commonwealth: But if it had bin but a private treſpaſſe, as the going over anothers ground, or the breaking of his incloſure when I am purſued for the ſafeguard of my life, it is juſtifiable.

6.Ed.4.7.per Sareſ.

4.H.7.2. This rule admitteth an exception when the law doth intend ſome fault or wrong in the party that hath brought himſelfe into the neceſſity: ſo that is *neceſſitas culpabilis*. This I take to bee the chiefe reaſon why *ſeipſum defendendo* is not matter of juſtification, becauſe the law intends it hath a commencement upon an unlawfull cauſe, becauſe quarrels are not preſumed to grow without ſome wrongs either in words or deeds on either part, and the law that thinketh it a thing hardly triable in whoſe default the quarrell began, ſuppoſeth the party that kils another in his owne defence not to bee without malice; and therefore as it doth not touch him in the higheſt degree, ſo it putteth him to ſue out his pardon of courſe, and puniſheth him by forfeiture of goods: for where there cannot bee any malice or wrong preſumed, as where a man aſſailes me to rob me, and I kill him that aſſaileth mee; or if a woman kill him that aſſaileth her to raviſh her, it is juſtifiable without any pardon.

So

So the common caſe proveth this exception, that is, if a mad man commit a felony, he ſhall not loſe his life for it, becauſe his infirmitie came by the Act of God: but if a drunken man commit a felony, he ſhall not be excuſed, becauſe his imperfection came by his owne default; for the reaſon and loſſe of deprivation of will and election by neceſſity and by infirmity is all one, for the lack of (*arbitrium ſolutum*) is the matter: and therefore as *infirmitas culpabilis* excuſeth not, no more doth *neceſsitas culpabilis*. 21. H. 7. 13.

Corporalis injuria non recipit æſtimationem de futuro. *Reg. 6.*

THe law in many caſes that concerne lands or goods doth deprive a man of his preſent remedy, and turneth him over to a further circuit of remedy, rather than to ſuffer an inconvenience: but if it be queſtion of perſonall paine, the law will not compell him to ſuſtaine it and expect remedy, becauſe it holdeth no damage a ſufficient recompence for a wrong which is corporall.

As if the Sheriffe make a falſe returne that I am ſummoned, whereby I loſe my land; yet becauſe of the inconvenience of drawing all things to incertainty and delay, if the Sheriffes returne ſhould not be credited, I am excluded of my averment againſt it, and am put to mine action of deceit againſt the Sheriffe and Summoners: but if the Sheriffe upon a *Cap.* returne a *Cepi corpus, & quod eſt languidus in priſona,* 5. Ed. 4. 80. 3. H. 6. 3.

there I may come in and falſifie the returne of the Sheriffe to ſave my impriſonment.

So if a man menace me in my goods, and that he will burne certaine evidences of my land which hee hath in his hand, if I will not make unto him a bond, yet if I enter into bond by this terrour, I cannot avoid it by plea, becauſe the law holdeth it an inconvenience to avoid a ſpecialtie by ſuch matter of averment, and therefore I am put to mine action againſt ſuch a menacer: but if he reſtraine my perſon, or threaten me with a battery, or with the burning of my houſe, which is a ſafety and protection to my perſon, or with burning an inſtrument of manumiſſion, which is an evidence of my enfranchiſement; if upon ſuch menace or dureſſe I make a deed, I ſhall avoid it by plea.

7. Ed. 4. 22.

So if a treſpaſſer drive away my beaſts over anothers ground, I purſue them to reſcue them, yet am I a treſpaſſer to the ſtranger upon whoſe ground I came; but if a man aſſaile my perſon, and I flye over anothers ground, now am I no treſpaſſer.

13. H. 8. 15.
21. H. 7. 28.

This ground ſome of the Canoniſts doe aptly inferre out of Chriſts ſacred mouth, *Amen, eſt corpus ſupra veſtimentum*, where they ſay *veſtimentum* comprehendeth all outward things appertaining to a mans condition, as lands and goods, which they ſay, are not in the ſame degree with that which is corporall; and this was the reaſon of the ancient *lex talionis, oculus pro oculo, dens pro dente*, ſo that by that law *corporalis injuria de præterito non recepit æſtimationem*: But our law when the injury is already executed

cuted and inflicted, thinketh it beſt ſatisfaction to the party grieved to relieve him in damage, and to give him rather profit than revenge; but it will never force a man to tolerate a corporall hurt, & to depend upon that inferiour kind of ſatisfaction, *ut in dammagiis.*

Excuſat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus. Reg. 7.

IN Capitall Cauſes in *favorem vitæ* the law will not puniſh in ſo high a degree, except the malice of the will and intention appeare; but in Civill treſpaſſes and injuries that are of an inferiour nature, the law doth rather conſider the damage of the party wronged, than the malice of him that was the wrong doer: and therefore,

The law makes a difference between killing a man upon malice fore-thought, and upon preſent heat: But if I give a man ſlanderous words, whereby I damnifie him in his name and credit, it is not materiall whether I uſe them upon ſudden choler and provocation, or of ſet malice, but in an action upon the caſe I ſhall render damages alike.

So if a man be killed by miſadventure, as by an arrow at Buts, this hath a pardon of courſe: but if a man be hurt or maimed onely, an action of treſpaſſe lieth, though it be done againſt the parties minde and will, and he ſhall be puniſhed in the law as deeply as if he had done it of malice. Stamf. 18. 6. Ed. 4. 7.

So if a Surgeon authorized to practice, do through negligence in his cure cauſe the partie to dye, the Stamf. 16.

Surgeon ſhall not be brought in queſtion of his life; and yet if he doe onely hurt the wound, whereby the cure is caſt backe, and death enſues not, he is ſubject to an action upon the caſe for his misfeiſance.

So if Baron and Feme be, and they commit felony together, the Feme is neither principall nor acceſſary, in regard of her obedience to the will of her husband: but if Baron and Feme join in committing a treſpaſſe upon land or otherwiſe, the action may be brought againſt them both.

So if an infant within yeeres of diſcretion, or a mad man kill another, he ſhall not be impeached thereof; but if they put out a mans eye, or doe him like corporall hurt, he ſhall be puniſhed in treſpaſſe.

35. H. 6. 11. So in felonies the law admitteth the difference of principall and acceſſary, and if the principall dye, or be pardoned, the proceeding againſt the acceſſary

27. H. 4. 19. faileth: but in a treſpaſſe, if one command his man to beat you, and the ſervant after the battery dye, yet your action of treſpaſſe ſtands good againſt the Maſter.

Reg. 8. *Æſtimatio præteriti delicti ex poſtremo facto nunquam creſcit.*

THe law conſtrueth neither penall lawes, nor penall facts by intendments, but conſidereth the offence in degree, as it ſtandeth at the time when it is committed; ſo as if any circumſtance or matter be ſubſequent, which laid together with the beginning ſhould ſeeme to draw it to a higher nature, yet the

the law doth not extend or amplifie the offence.

Therefore if a man be wounded, and the percuſſor is voluntarily let goe at large by the Jailor, and after death enſueth of the hurt, yet this is no felonious eſcape in the Jailor. 11. H. 4. 12.

So if the Villein ſtrike the heire apparent of the Lord, and the Lord dieth before, and the perſon hurt who ſucceedeth to be Lord to the Villeine dieth after, yet this is no pety treaſon.

So if a man compaſſe and imagineth the death of one that after commeth to be King of the land, not being any perſon mentioned within the ſtatute of 25. Ed. 3. this imagination precedent is not high treaſon.

So if a man uſe ſlanderous words of a perſon upon whom ſome dignitie after deſcends that maketh him a Peere of the Realme, yet he ſhall have but a ſimple action of the caſe, and not in the nature of a *ſcandalum Magnatum* upon the ſtatute.

So if John Stile ſteale ſix pence from me in money, and the King by his Proclamation doth raiſe moneys, that the weight of ſilver in the piece now of ſix pence ſhould goe for twelve pence, yet this ſhall remaine pety larceny and no felony: and yet in all civill reckonings the alteration ſhall take place: as if I contract with a Labourer to doe ſome worke for twelve pence, and the inhaunſing of money commeth before I pay him, I ſhall ſatisfie my contract with a ſixpeny piece ſo raiſed.

So if a man deliver goods to one to keep, and after retaine the ſame perſon into his ſervice, who afterwards goeth away with his goods, this is no felony by 28. H. 8. pl. 2.

by the Statute of 21.H.8. becauſe he was no ſervant at that time.

In like manner, if I deliver goods to the ſervant of I.S. to keep, and after dye, and make I.S. my executor, and before any new commandement of I.S. to his ſervant for the cuſtody of the ſame goods, his ſervant goeth away with them, this is alſo out of the ſtatute. *Quod nota.*

But note that it is ſaid *præteriti delicti*; for any acceſſary before the fact is ſubject to all the contingencies pregnant of the fact, if they be purſuances of the ſame fact: As if a man command or counſell one to rob a man, or beat him grievouſly, and murther enſue, in either caſe he is acceſſary to the murther, *quia in criminalibus præſtantur accidentia.* 18.Eliz.175.

Regula 9. *Quod remedio deſtituitur ipſa re valet ſi culpa abſit.*

THe benignitie of the law is ſuch, as when to preſerve the principles and grounds of law it depriveth a man of his remedy without his owne fault, it will rather put him in a better degree and condition than in a worſe; for if it diſable him to purſue his action, or to make his claime, ſometimes it will give him the thing it ſelfe by operation of law without any act of his owne, ſometimes it will give him a more beneficiall remedy.

And therefore if the heire of the diſſeiſor which is in by diſcent make a leaſe for life, the remainder for life unto the diſſeiſee, and the leſſee for life die, now 1 Iq. 3.H.8.

the

the francktenement is caſt upon the diſſeiſee by act in law, and thereby he is diſabled to bring his *Præcipe* to recover his right, whereupon the law judgeth him in his ancient right as ſtrongly as if it had been recovered and executed by action, which operation of law is by an ancient terme and word of law called a remitter; but if there may be aſſigned any default or laches in him, either in accepting the freehold, or in accepting the intereſt that drawes the freehold, then the law denyeth him any ſuch benefit.

And therefore if the heire of the diſſeiſor make a leaſe for yeeres, the remainder in fee to the diſſeiſee, the diſſeiſee is not remitted, and yet the remainder is in him without his owne knowledge or aſſent; but becauſe the freehold is not caſt upon him by act in law, it is no remitter. *Quod nota.* Lit. pl. 682.

So if the heire of the diſſeiſor infeoffe the diſſeiſee and a ſtranger, and make him livery, although the ſtranger die before any agreement or taking of the profits by the diſſeiſee, yet he is not remitted, becauſe though a moitie be caſt upon him by ſurvivor, yet that is but *Ius accreſcendi*, and it is no caſting of the freehold upon him by act in law, but he is ſtill as an immediate purchaſer, and therefore no remitter. Lit. pl. 685.

So if the husband be ſeiſed in the right of his wife, and diſcontinue and dieth, and the Feme takes another husband, who takes a feoffement from the diſcontinuee to him and his wife, the Feme is not remitted; and the reaſon is, becauſe ſhee was once Semble in ceſt caſe clerement le ley deeme contrary.

Lit. pl. 666. once ſole, and ſo a laches in her for not purſuing her right: but if the feoffement taken back had been to the firſt husband and her ſelfe, ſhee had been remitted.

2. M. condic. 3. Yet if the husband diſcontinue the lands of the wife, and the diſcontinuee make a feoffement to the uſe of the husband and wife, ſhee is not remitted; but that is upon a ſpeciall reaſon, upon the letter of the ſtatute of 27. H. 8. of uſes, that wiſheth that the *ceſtui que uſe* ſhall have the poſſeſſion in qualitie and degree as he had the uſe; but that holdeth place onely upon the firſt veſting of the uſe; for when the uſe is abſolutely executed and veſted, then it doth 34. H. 8. Dyer 349. inſue meerly the nature of poſſeſſions; as if the diſcontinuee had made a feoffement in fee to the uſe of I. S. for life, the remainder to the uſe of Baron and Feme, and leſſee for life dye, now the Feme is remitted, *cauſa qua ſupra.*

Alſo if the heire of the diſſeiſor make a leaſe for life, the remainder to the diſſeiſee, who chargeth the remainder, and the leſſee for life dies, the diſſeiſee is not remitted; and the reaſon is, his intermedling with the wrongfull remainder, whereby he hath affirmed the ſame to be in him, and ſo accepted it: but if the heire of the diſſeiſor had granted a rent charge to the diſſeiſee, and afterwards made a leaſe for life, the remainder to the diſſeiſee, and the leſſee for life had died, the diſſeiſee had beene remitted, becauſe there appeareth no aſſent or acceptance of any eſtate in the freehold, but onely of a collaterall charge.

So

So if the feme bee diſſeiſed and intermarry with the diſſeiſor, who makes a leaſe for life, rendring rent, and dieth leaving a ſonne by the ſame feme, and the ſonne accepts the rent of the leſſee for life, and then the feme dies, and the leſſee for life dies, the ſon is not remitted, yet the francktenement was caſt upon him by act in law, but becauſe hee had agreed to bee in the tortious reverſion by acceptance of the rent, therefore no remitter. 6.Ed.3.17. 28.H.8.pl.207

So if tenant in taile diſcontinue, and the diſcontinuee make a leaſe for life, the remainder to the iſſue in taile being within age, and at full age the leſſee for life ſurrendreth to the iſſue in taile, and tenant in taile dies, and leſſee for life dies, yet the ſame iſſue is not remitted; and yet if the iſſue had accepted a feoffement within age, and had continued the taking of the profits when he came of full age, and then the tenant in taile had died, notwithſtanding his taking of the profits he had beene remitted: for that which guides the remitter, is, if he be once in of the freehold without any laches: as if the heire of the diſſeiſor enfeoffes the heire of the diſſeiſee who dies, and it deſcends to a ſecond heire upon whom the francktenement is caſt by deſcent, who enters and takes the profits, and then the diſſeiſee dies, this is a remitter, *cauſa qua ſupra.*

Alſo if tenant in taile diſcontinue for life, and take a ſurrender of the leaſee, now is hee remitted and ſeiſed againe by force of the taile, and yet hee commeth in by his owne act: but this caſe differeth from all other caſes, becauſe the diſcontinuance was Lit.pl.3.6.

but particular at first, and the new gained reversion is but by intendment and necessity of law; & therfore is but as it were *ab initio*, with a limitation to determine whensoever the particular discontinuance endeth, & the state cõmeth back to the ancient right.

To proceed from cases of remitter, which is a great branch of this rule, to other cases: If executors doe redeeme goods pledged by their testator with their own mony, the law doth convert so much goods as 6.H.8.pl.3.Dy doth amount to the value of that they laid forth, to themselves in property, and upon a plea of fully administred it shall be allowed: the reason is, because it may be matter of necessity for the well administring of the goods of the testator, and executing their trust that they disburst mony of their owne: for else perhaps the goods would be forfeited, and he that had them in pledge would not accept other goods but mony, & so it is a liberty which the law gives them, and they cannot have any suit against themselves; and therefore the law gives them leave to retaine so much goods by way of allowance: and if there bee two executors, and one of them pay the mony, hee may likewise retain against his companion if he have notice thereof.

3.Eliz.187. pl.8. But if there be an overplus of goods, above the value of that he shall disburse, then ought he by his claime to determine what goods hee doth elect to have in value, or else before such election if his companion doe sell all the goods, hee hath no remedy but in spirituall Court: for to say he should bee tenant in common with himselfe and his companion

pro rata of that he doth lay out, the law doth reject that course for intricateneſſe.

So if I have a leaſe for yeeres worth 20l. by the yeere, and grant unto I.D. a rent of 10l. a yeere, and after make him my executor, now I.D. ſhall be charged with aſſets 10l. onely, and the other 10l. ſhall be allowed and conſidered to him; and the reaſon is, becauſe the not refuſing ſhall bee accounted no laches unto him, becauſe an executorſhip is *pium officium*, and matter of conſcience and truſt, and not like a purchaſe to a mans owne uſe. 19.H.8.pl.7. in fine. 22.Aſſ.52.F. Rec. in value 23.

Like law it is, where the debtor makes the debtee his executor, the debt ſhall bee conſidered in the aſſets, notwithſtanding it bee a thing in action. 2.H.4.21. Cond. 185. 2.H.7.5. 37.H.6.32.

So if I have a rent charge, and graunt that upon condition, now though the condition be broken, the grantees eſtate is not defeated till I have made my claim; but if after ſuch grant my father purchaſe the land, and it diſcend to me, now if the condition be broken, the rent ceaſeth without claime: But if I had purchaſed the land my ſelfe, then I had extincted mine owne condition, becauſe I had diſabled my ſelfe to make my claime, and yet a condition collaterall is not ſuſpended by taking back an eſtate; as if I make a feoffement in fee, upon condition that I.S. ſhall marry my daughter, and take a leaſe for life from my feoffee, if the feoffe breake the condition I may claime to hold in by my fee-ſimple; but the caſe of the charge is otherwiſe, for if I have a 6.Ed.6.cond. 133. Lit.pl.135. 20.H.7.per Pol. 35.H.6.Fitz. Barr.162.

rent charge issuing out of 20. acres, and grant the rent over upon condition, and purchase but one acre, the whole condition is extinct, and the possibility of the rent by reason of the condition, is as fully destroyed as if there had been no rent in *Esse*.

30.H.6.pl. Graunts 91. So if the King grant to mee the wardship of I.S. the sonne and heire of I.S. when it falleth, because an action of covenant lieth not against the King, I shall have the thing my selfe in interest.

But if I let land to I.S. rendring a rent, with a condition of re-entry, and I.S. bee attainted, whereby the lease commeth to the King, now the demand upon this land is gone, which should give me benefit of re-entry, and yet I shall not have it reduced without demand; and the reason of difference is, because my condition in this case is not taken away in right, but onely suspended by the priviledge of the possession: for if the King grant the lease over, the condition is revived as it was. 7.H.6.40.

Also if my tenant for life graunt his estate to the King, now if I will graunt my reversion over, the King is not compellable to atturne, therefore it shall passe by grant by deed without atturnment.

9.Ed.2.Fitz. Atturnments 18. So if my tenant for life bee, and I graunt my reversion *per auter vie*, and the grauntee dye, living *cestui que vie*, now the privity between tenant for life and mee is not restored, and I have no tenant in *esse* to atturne, therefore I may passe my reversion without atturnment. *Quod nota.*

So if I have a nomination to a Church, and another hath the presentation, and the presentation comes

comes to the King, now becauſe the King cannot be attendant, my nomination is turned to an abſolute patronage.

So if a man bee ſeiſed in an advowſon, and take a wife, and after title of dower given her, joine in impropriating the Church, and dieth, now becauſe the Feme cannot have the turne becauſe of the perpetuall incumbency, ſhe ſhall have all the turns during her life; for it ſhall not be diſimpropriated to the benefit of the heire contrary to the graunt of tenant in fee-ſimple.

6. Ed. 6. Dy. 72. Vide contra 2. E. 3. fo. 8. que per preſentmẽt del feme lad-vowſon eſt deveign diſimpropriate a touts jours quel eſt agree in Snr Cok. Rep. 7. fo. 8. a.

But if a man graunt the third preſentment to I.S. and his heires, and impropriate the advowſon, now the grauntee is without remedy, for hee tooke his graunt ſubject to that miſchiefe at firſt, and therefore it was his laches, and therefore not like the caſe of the dower; and this graunt of the third avoidance is not like *tertia pars advocationis*, or *medietas advocationis* upon a tenancy in common of the advowſon; for if two tenants in common bee, and an uſurpation bee had againſt them, and the uſurper doe impropriate, and one of the tenants in common doe releaſe, and the other bring his writ of right *de medietate advocationis* and recover, now I take the law to bee that becauſe tenants in common ought to joine in preſentment, which cannot now bee, hee ſhall have the whole patronage; for neither can there bee an apportionment, that hee ſhould preſent all the turnes, and his Incumbent but to have a moity of the profits, nor yet the act of impropriation ſhall not bee defeated.

45.Ed.3. feated. But as if two tenants in common bee of a Ward, and they joine in a writ of right of Ward, and one releaſe, the other ſhall recover the entire Ward, becauſe it cannot be divided: ſo ſhall it be in the other caſe, though it bee an inheritance, and though he bring his action alone.

As if a diſſeiſor be diſſeiſed, and the firſt diſſeiſee releaſe to the ſecond diſſeiſor upon condition, and a deſcent be caſt, and the condition broken; now the meane diſſeiſor whoſe right is revived ſhall enter notwithſtanding this diſcent, becauſe his right was taken away by the act of a ſtranger.

Le contrary fuit reſolve in Martin Trotts caſe. pa. 32. Eliz. in Com. Banco, & Pa. 1. Iac. ib. vide 7. R. 2. Scire fac. 3. 41. E. 3. 14. per Finchden.

But if I deviſe land by the ſtatute of 32. *H.* 8. and the heire of the deviſor enters and makes a feoffment in fee, and the feoffee dieth ſeiſed, this diſcent binds, and there ſhall not bee a perpetuall liberty of entry, upon the reaſon that he never had ſeiſon whereupon he might ground his action, but he is at a miſchiefe by his owne laches: and like law is of the Kings Patentee; for I ſee no reaſonable difference betweene them and him in the remainder, which is *Littletons* caſe.

But note, that the law by operation and matter in fact will never countervaile and ſupply a title grounded upon a matter of record, and therefore if I bee entituled unto a writ of error, and the land deſcend unto me, I ſhall neuer be remitted, no more ſhall I be unto an attaint, except I may alſo have a writ of right.

25. H. 8. Dy. 1. 7.

So if upon my avowry for ſervices, my tenant diſclaime where I may have a writ of right as upon diſclaimer,

claimer, if the land after descend to me, I shall never be remitted.

Verba generalia restringuntur ad habilitatem rei vel personæ. Regula 10.

IT is a rule that the Kings grants shall not be taken or construed to a speciall intent; it is not so with the grants of a common person, for they shall be extended as well to a forrein intent as to a common intent; yet with this exception, that they shall never be taken to an impertinent or a repugnant intent: for all words, whether they bee in deeds or statutes, or otherwise if they be generall and not expresse and precise, shall bee restrained unto the fitnesse of the matter or person.

As if I grant Common *in omnibus terris meis* in D. and I have in D. both open grounds and severall, it shall not bee stretched to my common in severall, much lesse in my gardens and orchards. Perk. pl. 108.

So if I grant to a man *omnes arbores meas crescentes supra terras meas in* D. hee shall not have Apple trees, or other fruit trees growing in my gardens or orchards, if there bee any other trees upon my ground. 14 H 8. 2.

So if I graunt to I.S. an annuity of x.l. a yeere *pro consilio impenso & impendendo*, if I. S. be a Physitian, it shall be understood of his counsell in physick; and if he be a Lawyer, of his counsell in Law. 41. Ed. 3. 6. 19.

So if I do let a tenement to I. S. neer by my dwelling house in a Borough, provided that hee shall not

erect

erect or use any shop in the same without my licence, and afterwards I licence him to erect a shop, and I.S. is then a Miller, he shall not by vertue of these generall words erect a Joiners shop.

16. Eliz. 337. Dyer. So the statute of Chanteries that willeth all lands to be forfeited, given or imployed to a superstitious use, shall not be construed of the glebe lands of parsonages: nay further, if the lands bee given to the Parson of D. to say a Masse in his Church of D. this is out of the statute, because it shall bee intended but as an augmentation of his glebe; but otherwise had it beene if it had been to say a Masse in any other Church but his owne.

So in the statute of wrecks that willeth that goods wrackt where any live domesticall creature remains in a vessell, shall be preserved to the use of the owner that shall make his claime by the space of one yeere, doth not extend to fresh victuals or the like, which is impossible to keep without perishing or destroying it; for in these and the like cases generall words may be taken, as was said, to a rare and forrein intent, but never to an unreasonable intent.

Regula 11. *Iura sanguinis nullo iure civili dirimi possunt.*

THey bee the very words of the Civill Law, which cannot be amended to explaine this rule. *Hæres est nomen Iuris, Filius est nomen Naturæ:* therefore corruption of blood taketh away the privity of the one, that is, of the heire, but not of

of the other, that is, of the ſonne ; therefore if a man be attainted and murthered by a ſtranger, the eldeſt ſonne ſhall not have the appeale, becauſe the appeale is given to the heire, for the youngeſt ſonnes who are equall in bloud ſhall not have it ; but if an attainted perſon be killed by his ſonne, this is petty treaſon, for that the privitie of a ſonne remaineth : for I admit the law to be, that if the ſonne kill his father or mother, it is pettie treaſon, and that there remaineth ſo much in our lawes of the ancient foot-ſteps of *Poteſtas patris* and naturall obedience, which by the law of God is the very inſtance it ſelfe, and all other government and obedience is taken but by equitie, which I adde, becauſe ſome have thought to weaken the law in that point. 36.H.6.57.58. 21. Ed. 3. 17.

So if land deſcend to the eldeſt ſonne of a perſon attainted from his anceſtour, of the mother held in Knights ſervice, the guardian ſhall enter, and ouſte the father, becauſe the law giveth the father that prerogative in reſpect hee is his ſonne and heire ; for of a daughter or a ſpeciall heire in taile he ſhall not have it : but if the ſonne be attainted, and the father covenant in conſideration of naturall love to ſtand ſeiſed of land to his uſe, this is good enough to raiſe an uſe, becauſe the privitie of a naturall affection remaineth. F.N.Br.fo.143

So if a man be attainted and have a Charter of pardon, and be returned of a Jury betweene his ſonne and I. S. the challenge remaineth ; for hee may maintaine any ſuit of his ſonne, notwithſtanding the bloud be corrupted.

So by the ſtatute of 21. the Ordinary ought to commit the adminiſtration of his goods that was attainted, and purchaſe his Charter of pardon to his children, though borne before the pardon, for it is no queſtion of his inheritance: for if one brother of the halfe bloud dye, the adminiſtration ought to be committed to his other brother of the halfe bloud, if there be no neerer by the father.

5. Ed. 6. Adm. 47.

So if the uncle by the mother be attainted, and pardoned, and land deſcend from the father to the ſonne within age held in ſocage, the uncle ſhall be guardian in ſocage; for that ſavoureth ſo little of the privitie of heire, as the poſſibilitie to inherit ſhutteth not.

33. H. 6. 55.

But if a Feme tenant in taile aſſent to the raviſher, and have no iſſue, and her couſin is attainted, and pardoned, and purchaſeth the reverſion, hee ſhall not enter for a forfeiture. For though the law giveth it not in point of inheritance, but onely as a perquiſite to any of the bloud, ſo hee be next in eſtate, yet the recompence is underſtood for the ſtaine of his bloud, which cannot be conſidered when it is once wholly corrupted before.

5. Ed. 4. 5.

So if a Villeine be attainted, yet the Lord ſhall have the iſſues of his Villeine borne before or after the attainder; for the Lord hath them *Iure naturæ* but as the increaſe of a flock.

Quære whether if the eldeſt ſonne bee attainted, and pardoned, the Lord ſhall have ayde of his tenants to make him a Knight, and it ſeemeth he

F. N. br. 829.

he ſhall ; for the words of the Writ hath *filium primogenitum*, and not *filium & haeredem*, and the like Writ hath *pur file marrier* who is no heire. Regiſter. fol. 87.

Receditur à placitis juris, potius quàm injuriæ, & delicta maneant impunita. *Regula* 12.

THe law hath many grounds and poſitive learnings, which are not of the maximes and concluſions of reaſon, but yet are learnings received with the law, ſet downe, and will not have called in queſtion : theſe may be rather called *placita juris* than *regulæ juris* ; with ſuch maximes the law will diſpenſe, rather than crimes and wrongs ſhould be unpuniſhed, *quia ſalus populi ſuprema lex*, and *ſalus populi* is contained in the repreſſing offences by puniſhment.

Therefore if an advouſon be granted to two, and the heires of one of them, and an uſurpation be had, they bothſhall joyne in a writ of right of advouſon ; and yet it is a ground in law, that a writ of right lyeth of no leſſe eſtate than a fee-ſimple ; but becauſe the tenant for life hath no other ſeverall action in the law given him, and alſo that the joynture is not broken, and ſo the tenant in fee-ſimple cannot bring his writ of right alone, therefore rather than he ſhall be deprived wholly of remedy, and this wrong unpuniſhed, hee ſhall joyne his companion with him, notwithſtanding the feebleneſſe of his eſtate.

But if lands be given to two, and to the heires 46. Ed. 3. 21.

of one of them, and they leese in a *Precipe* by default, now they shall not joyne in a writ of right, because the tenant for life hath a severall action, *viz.* a *Quod ei deforciat*, in which respect the joynture is broken.

So if tenant for life and his lessor joyne in a lease for yeares, and the lessee commit waste, they shall joyne in punishing this waste, and *locus vastatus* shall goe to the tenant for life, and the damages to him in reversion, and yet an action of waste lyeth not for tenant for life, but because he in the reversion cannot have it alone, because of the meane estate for life, therefore rather than the waste shall be unpunished, they shall joyne.

45. Ed. 3. 3. 22. H. 6. 24. So if two coperceners be, and they lease the land, and one of them dye, and hath issue, and the lessee commit waste, the aunt and the issue shall joyne in punishing this waste, and the issue shall recover the moitie of the place wasted, and the aunt the other moitie and the entire damages; and yet *actio injuriarum moritur cum persona*, but *in favorabilibus magis attenditur quod prodest, quàm quod nocet.*

20. Ed. 2. So if a man recovers by erroneous judgement, and hath issue two daughters, and one of them is attainted, the writ of errour shall be brought against the parceners, notwithstanding the privitie faile in the one. F. discent 16.

33. Eliz. Also it is a positive ground, that the accessary in felony cannot be proceeded against, untill the principall be tryed; yet if a man upon subtiltie and malice set a mad man by some device to kill him,

and

and he doth ſo, now foraſmuch as the mad man is excuſed, becauſe he can have no will, nor malice, the law accounteth the inciter as principall, though he be abſent, rather than the crime ſhall goe unpuniſhed.

So it is a ground of the law, that the appeale of murther goeth not to the heire where the partie murthered hath a wife, nor to the younger brother where there is an elder; yet if the wife murther her husband, becauſe ſhee is the partie offendor, the appeale leaps over to the heire; and ſo if the ſonne and heire murther his father, it goeth to the ſecond brother.

Fitz. Corone 459. Ed. 4. M. 28. 6. Stamff. lib. 2. fol. 60.

But if the rule be one of the higher ſort of maximes, that are *regulæ rationales*, and not *poſitivæ*, then the law will rather endure a particular offence to eſcape without puniſhment, than violate ſuch a rule.

As it is a rule that penall ſtatutes ſhall not bee taken by equitie, and the ſtatute of 1. *Ed.* 6. enacts that thoſe that are attainted for ſtealing of horſes ſhall not have their clergie, the Judges conceived, that this did not extend to him that ſhould ſteale but one horſe, and therefore procured a new act for it in 2. *Ed.* 6. *cap.* 33. and they had reaſon for it, as I take the law, for it is not like the caſe upon the ſtatute of *Gloſt.* that gives the action of waſte againſt him that holds *pro termino vitæ vel annorum*. It is true, that if a man holds but for a yeare, he is within the ſtatute, for it is to be noted, that penall ſtatutes are taken ſtrictly and literally onely in the point of defining

Plow. 467.

Lit. cap. 46. Ed. 3. 32.

and ſetting downe the fact and the puniſhment, and in thoſe clauſes that doe concerne them, and not generally in words that are but circumſtances and conveyance in the putting of the caſe, and ſo ſee the diverſitie; for if the law be, that for ſuch an offence a man ſhall leeſe his right hand, and the offendor hath had his right hand before cut off in the warres, he ſhall not loſe his left hand, but the crime ſhall rather paſſe without the puniſhment which the law aſſigned, than the letter of the law ſhould be extended; but if the ſtatute of 1. *Ed.* 6. had beene, that hee that ſhould ſteale one horſe ſhould bee ouſted of his Clergie, then there had beene no queſtion at all, but if a man had ſtolne more horſes than one, but that hee had beene within the ſtatute, *quia omne majus continet in ſe minus.*

Regula 13. *Non accipi debent verba in demonſtrationem falſam quæ competunt in limitationem veram.*

THough falſitie of addition or demonſtration doth not hurt where you give the thing a proper name, yet nevertheleſſe if it ſtand doubtfull upon the words, whether they import a falſe reference and demonſtration, or whether they bee words of reſtraint that limit the generalitie of the former name, the law will never intend error or falſhood.

12. Eliz. 6. 291.
23. Eliz. Dyer 376.
7. Ed. 6. Dy. 56.

Therefore if the Pariſh of Hurſt doe extend into the Counties of Wiltſh. and Barkſh. and I grant my

my Cloſe called Callis, ſituate and lying in the Pariſh of Hurſt in the countie of Wiltſh. and the troth is, that the whole Cloſe lieth in the Countie of Barkſh. yet the law is, that it paſſeth well enough, becauſe there is a certaintie ſufficient in that I have given it a proper name which the falſe reference doth not deſtroy, and not upon the reaſon that theſe words, in the Countie of Wiltſh. ſhall be taken to goe to the Pariſh onely, and ſo to be true in ſome ſort, and not to the Cloſe, and ſo to be falſe. For if I had granted *omnes terras meas in Parochia de Hurſt in Com. Wiltſh.* and I had no lands in Wiltſh. but in Barkſh. nothing had paſt.

But in the principall caſe, if the Cloſe called Callis had extended part into Wiltſh. and part into Barkſh. then onely that part had paſſed which lay in Wiltſh. 9. Ed. 4. 7. 21. Ed. 3. 18. 18. Eliz.

So if I grant *omnes & ſingulas terras meas in tenura I. D. quas perquiſivi de I. N. in Indentura dimiſſionis fact' I. B. ſpecificat.* If I have land wherein ſome of theſe references are true and the reſt falſe, and no land wherein they are all true, nothing paſſeth: as if I have land in the tenure of I. D. and purchaſed of I. N. but not ſpecified in the Indenture to I. B. or if I have land which I purchaſed of I. N. and ſpecified in the Indenture of demiſe to I. B. and not in the tenure of I. D. 29. Reg.

But if I have ſome land wherein all theſe demonſtrations are true, and ſome wherein part of them are true and part falſe, then ſhall they bee intended words of true limitation to paſſe onely thoſe

thoſe lands wherein all thoſe circumſtances are true.

Regula 14. *Licet diſpoſitio de intereſſe futuro ſit inutilis, tamen poteſt fieri declaratio præcedens quæ ſortiatur effectum interveniente novo actu.*

THe law doth not allow of grants except there be a foundation of an intereſt in the grantor; for the law that will not accept of grants of titles, or of things in action which are imperfect intereſts, much leſſe will it allow a man to grant or incumber that which is no intereſt at all, but meerly future.

But of declarations precedent before any intereſt veſted, the law doth allow, but with this difference, ſo that there be ſome new act or conveyance to give life and vigour to the declaration precedent.

Now the beſt rule of diſtinction betweene grants and declarations, is, that grants are never countermandable not in reſpect of the nature of the conveyance or inſtrument, though ſometime in reſpect of the intereſt granted they are, whereas declarations evermore are countermandable in their natures.

20. Eliz. 19. H. 6. 62. And therefore if I grant unto you, that if you enter into an obligation to me of 100. l. and after doe procure me ſuch a leaſe, that then the ſame obligation ſhall be void, and you enter into ſuch an obligation unto me, and afterwards doe procure ſuch

ſuch a leaſe, yet the obligation is ſimple, becauſe the defeiſance was made of that which was not.

So if I grant unto you a rent charge out of white acre, and that it ſhall be lawfull for you to diſtraine in all my other lands whereof I am now ſeiſed, and which I ſhall hereafter purchaſe, although this be but a libertie of diſtreſſe, and no rent ſave onely out of white acre, yet as to the lands afterwards to bee purchaſed the clauſe is voyd. 27. Ed. 3.

So if a reverſion be granted to I. S. and I. D. a ſtranger by his deed doe grant to I. S. that if he purchaſe the particular eſtate, he will atturne to the grant, this is a voyd atturnment, notwithſtanding he doth afterwards purchaſe the particular eſtate. 29. Ed. 3. 6. 24. Eliz.

But of declarations the law is contrary; as if the diſſeiſee make a Charter of feoffement to I. S. and a letter of atturney to enter and make livery and ſeiſin, and deliver the deed of feoffement, and afterwards livery and ſeiſin is made accordingly, this is a good feoffement, and yet he had no other thing than a right at the time of the delivery of the Charter, but becauſe a deed of feoffement is but matter of declaration and evidence, and there is a new act which is the livery ſubſequent, therefore it is good in law. 13. 14. Eliz. 20. 21. Eliz. 25. Eliz. M. 38. & 39. Eliz.

So if a man make a feoffement to I. S. upon condition to enfeoffe I. N. within certaine dayes, and there are deeds made both of the firſt feoffement and the ſecond, and letters of atturney accordingly, and both thoſe deeds of feoffement, 36. Eliz.

and letters of atturney are delivered at a time, ſo that the ſecond deed of feoffement and letters of atturney are delivered when the firſt feoffee had nothing in the land, and yet if both liveries be made accordingly, all is good.

So if I covenant with I. S. by indenture, that before ſuch a day I will purchaſe the mannour of D. and before the ſame day I will levy a fine of the ſame land, and that the ſame fine ſhall be to certaine uſes which I expreſſe in the ſame indenture, this indenture to lewd uſes being but matter of declaration and countermandable, at my pleaſure will ſuffice, though the land be purchaſed after; becauſe there is a new act to be done, *viz.* the fine.

25. Eliz. 27. Eliz. But if there were no new act, then otherwiſe it is; as if I covenant with my ſonne, in conſideration of naturall love, to ſtand ſeiſed unto his uſe of the lands which I ſhall afterwards purchaſe, yet the uſe is voyd; and the reaſon is, becauſe there is no new act, nor tranſmutation of poſſeſſion following to perfect this inception; for the uſe muſt bee limited by the feoffor, and not the feoffee, and hee had nothing at the time of the covenant.

Com. Plowd. Rigdens caſe. So if I deviſe the mannour of D. by ſpeciall name, of which at that time I am not ſeiſed, and after I purchaſe it, except I make ſome new publication of my will, this device is voyd; and the reaſon is, becauſe that my death, which is the conſummation of my will, is the act of God, and not my act, and therefore no ſuch act as the law requireth.

But

But if I grant unto I. S. authoritie by my deed to demiſe for yeares, the land whereof I am now ſeiſed, or hereafter ſhall be ſeiſed; and after I purchaſe the lands, and I.S. my Atturney doth demiſe them, this is a good demiſe, becauſe the demiſe of my Atturney is a new act, and all one with a demiſe by my ſelfe.

But if I morgage land, and after covenant with I. S. in conſideration of money which I receive of him, that after I have entred for the condition broken, I will ſtand ſeiſed to the uſe of the ſame I. S. and I enter, and this deed is enrolled, and all within the ſix moneths, yet nothing paſſeth away, becauſe this enrolment is no new act, but a perfective ceremony of the firſt deed of bargaine and ſale; and the law is more ſtrong in that caſe, becauſe of the vehement relation which the enrolment hath to the time of the bargaine and ſale, at what time he had nothing but a naked condition. 31. Eliz.

So if two Joyntenants be, and one of them bargaine, and ſell the whole land, and before the enrolment his companion dyeth, nothing paſſeth of the moitie accrued unto him by ſurvivor. 6. Ed. 6. Br.

In criminalibus ſufficit generalis malitia intentionis cum facto paris gradus. *Regula* 15.

ALl crimes have their conception in a corrupt intent, and have their conſummation and iſſuing in ſome particular fact; which though it be not the fact at which the intention of the malefactor levelled, yet the law giveth him no advantage of that error, if another particular enſue of as high a nature.

18. Eliz. Sanders case com. 474.

Therefore if an impoiſoned apple be laid in a place to poiſon I. S. and I. D. commeth by chance and eateth it, this is murther in the principall that is actor, and yet the malice *in individuo* was not againſt I. D.

Cr. I. peace. 30.

So if a thiefe finde the doore open, and come in by night and rob an houſe, and be taken with the manner, and breake a doore to eſcape, this is burglary, yet the breaking of the doore was without any felonious intent, but it is one entire act.

So if a Caliver be diſcharged with a murtherous intent at I. S. and the Peece breake, and ſtrike into the eye of him that diſchargeth it, and killeth him, he is *felo de ſe*, and yet his intention was not to hurt himſelfe; for *felonia de ſe* and murther are *crimina paria gradus*. For if a man perſwade another to kill himſelfe, and be preſent when he doth ſo, he is a murtherer.

Cave.

Cr. Juſt peace. fol. 18, 19.

But *quære*, if I. S. lay impoiſoned fruit for ſome other ſtranger his enemy, and his father or mother come and eat it, whether this be petty treaſon, becauſe it is not altogether *crimen paria gradus*.

Regula 16.

Mandata licita recipiunt ſtrictam interpretationem, ſed illicita latam & extenſam.

IN committing of lawfull authoritie to another, a man may limit it as ſtrictly as it pleaſeth him, and if the party authorized doe tranſgreſſe his authority, though it be but in circumſtance expreſſed, it ſhall be voyd in the whole act.

But

But when a man is author and monitor to another to commit an unlawfull act, then he ſhall not excuſe himſelfe by circumſtances not purſued.

Therefore if I make a letter of atturney to I. S. to deliver livery and ſeiſin in the capitall Meſſuage, and he doth it in another place of the land, or betweene the houres of two and three, and he doth it after or before; or if I make a Charter of feoffement to I. D. and I. B. and expreſſe the ſeiſin to be delivered to I. D. and my atturney deliver it to I. B. in all theſe caſes the act of the atturney as to execute the eſtate, is voyd; but if I ſay generally to I. D. whom I meane onely to enfeoffe, and my atturney make it to his atturney, it ſhall be intended, for it is a livery to him in law.

10. H. 7. 19. 15. 16. 16. El. Dy. 337. 16. El. Dy. 337. 11. El. Dy. 283. 38. H. 8. 68. Dy

But on the other ſide, If a man command I. S. to rob I. D. on Shooters-hill, and he doth it on Gads-hill, or to rob him ſuch a day, and he doth it not himſelfe but procureth I. B. to doe it; or to kill him by poyſon, and he doth it by violence; in all theſe caſes notwithſtanding the fact be not executed, yet he is acceſſary nevertheleſſe.

18. El. Sanders caſe. Com. 175

But if it be to kill I. S. and he killeth I. D. miſtaking him for I. S. then the acts are diſtant in ſubſtance, and he is not acceſſary.

Ibidem.

And be it that the facts be of differing degrees, and yet of a kinde.

As if a man bid I. S. to pilfer away ſuch things out of a houſe, and preciſely reſtraine him to doe it ſometimes when he is gotten in without breaking of the houſe, and yet hee breaketh the houſe, yet hee is acceſſary to the burglary:

for a man cannot condition with an unlawfull act, but he muſt at his perill take heed how he putteth himſelfe into another mans hands.

38. Eliz. in Sanders caſe. pl. Com. 475. But if a man bid one rob I. S. as he goeth to Sturbridge-faire, and hee rob him in his houſe, the variance ſeemes to be of ſubſtance, and he is not acceſſary.

Regula 17. *De fide & officio Iudicis non recipitur quæſtio, ſed de ſcientia, ſive error ſit Iuris ſive facti.*

THe law doth ſo much reſpect the certaintie of judgement, and the credit and authoritie of Judges, as it will not permit any error to be aſſigned that impeacheth them in their truſt and office, and in wilfull abuſe of the ſame, but onely in ignorance, and miſtaking either of the law or of the caſe and matter in fact.

F.N.br.fol.21. 7. H. 7. 4. And therefore if I will aſſigne for error, that whereas the verdict paſſed for me, the Court received it contrary, and ſo gave judgement againſt me, this ſhall not be accepted.

3. H. 6. aſſ. 3. So if I will alledge for errour, that whereas I. S. offered to plead a ſufficient barre, the Court refuſed it, and drave me from it, this errour ſhall not be allowed.

2. M. Dy. 114. But the greateſt doubt is where the Court doth determine of the veritie of the matter in fact; ſo that is rather a point of tryall than a point of judgement, whether it ſhall be re-examined in errour.

As

As if an appeale of Maihem be brought, and the Court, by the assistance of the Chyrurgians adjudge it to be a Maihem, whether the partie grieved may bring a writ of errour, and I hold the Law to be he cannot. 1. Mar. 5. 28 ass. pl. 15. 21. H. 7. 40. 35.

So if one of the Prothonotaries of the Common pleas bring an assize of his office, and alleage fees belonging to the same office in certaintie, and issue is taken upon these fees, this issue shall be tryed by the Judges by way of examination, and if they determine it for the plaintiffe, and he have judgement to recover arrerages accordingly, the defendant can bring no writ of errour of this judgement, though the fees in troth be other. 8. H. 4. 3. 1. Mar. Dy. 89. 5. Mar. Dy. 16.

So if a woman bring a writ of dower, and the tenant plead her husband was alive, this shall be tryed by proofes and not by jury, and upon judgement given on either side no error lies. 8. H. 6. 27. 2. El. 285. Dy. 43. ass. 26. 41. ass. 5. 39. ass. 9.

So if *nul tiel record* be pleaded which is to be tryed by the inspection of the record, and judgement be thereupon given, no error lyeth. 5. Ed. 4. 3. 9. H. 7. 2. 19. H. 6. 52.

So if in the assize the tenant saith, he is *Countee de dale & nient nosme Countee*, in the writ this shall be tryed by the records of the Chancery, and upon judgement given no errour lyeth. 22. ass. pl. 24. 19. Ed. 4. 6.

So if a felon demand his clergy, and reade well and distinctly, and the Court who is Judge thereof doe put him from his clergie wrongfully, errour shall never be brought upon the attainder.

So if upon judgement given upon confession for default, and the Court doe assesse dammages, the defendant shall never bring a writ, though 9. Ass. 8. F. N. Br. 22.

the

the damage bee outragious.

And it ſeemeth in the caſe of maihem, and ſome other caſes, that the Court may diſmiſſe themſelves of diſcuſſing the matter by examination, and put it to a Jury, and then the partie grieved ſhall have his attaint; and therefore it ſeemeth that the Court that doth deprive a man of his action, ſhould be ſubject to an action; but that, notwithſtanding, the law will not have, as was ſaid in the beginning, the Judges called in queſtion in the point of their office when they undertake to diſcuſſe the iſſue, and that is the true reaſon; for to ſay that the reaſon of theſe caſes ſhould be, becauſe tryall by the Court ſhould bee peremptory as tryall by certificate, (as by the Biſhop in caſe of baſtardy, or by the Marſhall of the King &c.) the caſes are nothing alike; for the reaſon of thoſe caſes of certificate is, becauſe if the Court ſhould not give credit to the certificate, but ſhould re-examine it, they have no other meane but to write againe to the ſame Lord Biſhop, or the ſame Lord Marſhall, which were frivolous, becauſe it is not to be preſumed they would differ from their former certificate; whereas in theſe other caſes of error the matter is drawne before a ſuperiour Court, to re-examine the errors of an inferiour Court: and therefore the true reaſon, as was ſaid, that to examine againe that which the Court had tryed, were in ſubſtance to attaint the Court.

21. Aſſ. 24.
11. H. 4. 41.
7. H. 6. 37.

And therefore this is a certaine rule in error, that error in law is ever of ſuch matters as were

not

not croſſed by the record, as to alledge the death of the tenant at the time of the judgement given, nothing appeareth upon record to the contrary.

So when the infant levies a fine, it appeareth not upon the record that hee is an infant, therefore it is an error in fact, and ſhall bee tried by inſpection during nonage. F.N.Br.21.

But if a writ of error bee brought in the Kings Bench, of a fine levied by an infant, and the Court by inſpection and examination doth affirme the fine, the infant, though it bee during his infancy, ſhall never bring a writ of error in the Parliament upon this judgement; not but that error lyes after error, but becauſe it doth now appeare upon the record that he is now of full age, therefore it can bee no error in fact. And therefore if a man will aſſigne for error that fact, that whereas the Judges gave judgement for him, the Clerkes entred it in the roll againſt him, this error ſhall not bee allowed, and yet it doth not touch the Judges but the Clerks, but the reaſon is, if it be an error, it is an error in fact; and you ſhall never alledge an error in fact contrary to the record. 2.R.3.20. F.N.Br.21. 9.Ed.4.3.

Perſona conjuncta æquiparatur intereſſe proprio.

Regula 18.

THe Law hath that reſpect of nature and conjunction of bloud, as in divers caſes it compareth and matcheth neereneſſe of bloud with

consideration of profit and intereſt, yea, and in ſome caſes alloweth of it more ſtrongly.

7. & 8. Eliz. Therefore if a man covenant in conſideration of bloud, to ſtand ſeiſed to the uſe of his brother, or ſonne, or neere kinſman, an uſe is well raiſed of this covenant without tranſmutation of poſſeſſion; nevertheleſſe it is true, that conſideration of bloud is not to ground a perſonall contract upon: as if I contract with my ſonne, that in conſideration of bloud I will give unto him ſuch a ſumme of mony, this is a *nudum pactum*, and no *aſſumpſit* lyeth upon it; for to ſubject me to an action, there needeth a conſideration of benefit, but the uſe the law raiſeth without ſuit or action; and beſides, the law doth match reall conſiderations with reall agreements and covenants.

19. Ed. 4. 5.
19. Ed. 4. 22.
22. H. 6. 35.
21. H. 6. 15. 16.
22. H. 6. 5.
20. H. 6.
14 H. 6. 6.
34. H. 7. 2. So if a ſuit be commenced againſt me, my ſonne, or brother, I may maintaine aſwell as hee in remainder for his intereſt, or his Lawyer for his fee, and if my brother have a ſuit againſt my nephew or couſin, yet it is at my election to maintaine the cauſe of my nephew or couſin, though the adverſe party bee neerer unto mee in bloud.

14. & 15. Eliz.
21. Ed. 4. 75.
Com. 4. 25. So in challenges of Juries, challenge of bloud is as good as challenge within diſtreſſe, and it is not materiall how farre of the kindred be, ſo the pedegree can bee conveyed in a certainty, whether it be of the halfe bloud or whole.

15. H. 6. 17.
39. H. 6. 50.
21. Ed. 4. 13.
18. H. 6. 21.
35. Ed. 4. 1. So if a man menace mee, that hee will impriſon, or hurt in body my father, or my childe, except I make ſuch an obligation, I ſhall avoid this dureſſe, as well as if the dureſſe had beene to

mine

mine owne person: and yet if a man menace mee, by taking away or destruction of my goods, this is no good duresse to plead; and the reason is, because the law can make me reparation of that losse, and so it cannot of the other. 39.H.6.91. 7.Ed.4.21. 20.Ass.14.

So if a man under the yeares of 21. contract for the nursing of his lawfull childe; this contract is good, and shall not be avoided by infancy, no more than if hee had contracted for his owne aliments or erudition. Perk.4. D cap.28.

Non impedit clausula derogatoria, quo minùs ab eadem potestate res dissolvantur à quibus constituuntur. Regula 19.

ACts which are in their natures revocable, cannot by strength of words bee fixed or perpetuated, yet men have put in ure two meanes to bind themselves from changing or dissolving that which they have set downe, whereof one is *clausula derogatoria*, the other *interpositio juramenti*, whereof the former is onely pertinent to this present purpose.

This *clausula derogatoria* is by the common practicall terme called *clausula non obstante de futuro esse*, the one weakening and disanulling any matter past to the contrary, the other any matter to come, and this latter is that onely whereof wee speake.

The *Clausula de non obstante de futuro*, the law judgeth to bee idle and of no force, because it doth

deprive men of that which of all other things is moſt incident to humane condition, and that is alteration or repentance.

Therefore if I make my will, and in the end thereof doe adde ſuch like clauſe, [Alſo my will is if I ſhall revoke this preſent will, or declare any new will, except the ſame ſhall bee in writing, ſubſcribed with the hands of two witneſſes, that ſuch revocation or new declaration ſhall be utterly void, and by theſe preſents I doe declare the ſame not to be my will, but this my former will to ſtand] any ſuch pretended will to the contrary notwithſtanding; yet nevertheleſſe this clauſe or any the like never ſo exactly penned, and although it doe reſtraine the revocation but in circumſtance and not altogether, is of no force or efficacy to fortifie the former will againſt the ſecond, but I may by paroll without writing repeale the ſame will, and make a new.

28.Ed.3.cap.7. 24.Ed.3.cap.5. 2.H.7.6. So if there bee a ſtatute made that no Sheriffe ſhall continue in his office above a yeare, and if any Patent bee made to the contrary, it ſhall bee void, and if there bee any *Clauſula de non obſtante* contained in ſuch Patent to diſpence with this preſent act, that ſuch clauſe alſo ſhall be void; yet nevertheleſſe a Patent of the Sheriffes office made by the King with a *non obſtante* will bee good in law, contrary to ſuch ſtatute, which pretendeth to exclude *non obſtantes*, and the reaſon is, becauſe it is an inſeparable prerogative of the Crowne to diſpenſe with politicke ſtatutes and of that kinde, and then the derogatory clauſe hurteth not.

So

So if an act of Parliament bee made wherein there is a clauſe contained, that it ſhall not bee lawfull for the King by authority of Parliament during the ſpace of ſeven yeares to repeale and determine the ſame act, this is a void clauſe, and ſuch act may bee repealed within the ſeven yeares, and yet if the Parliament ſhould enact in the nature of the ancient *Lex Regia*, that there ſhould bee no more Parliaments held, but that the King ſhould have the authority of the Parliament; this act were good in law, *quia poteſtas ſuprema ſeipſum diſſolvere poteſt, ligare non poteſt:* for as it is in the power of a man to kill a man, but it is not in his power to ſave him alive and to reſtraine him from breathing or feeling; ſo it is in the power of a Parliament to extinguiſh or transferre their owne authority, but not whilſt the authority remaines entire to reſtraine the functions and exerciſes of the ſame authority.

So in the 28. of K. H. 8. chap. 17. there was a ſtatute made, that all acts that paſſed in the minority of Kings, reckoning the ſame under the yeares of 24. might bee annulled and revoked by their letters Patents when they came to the ſame yeares; but this act in the firſt of K. Ed. 6. who was then between the yeares of 10. & 11. cap. 11. was repealed, and a new law ſurrogate in place thereof, wherein a more reaſonable liberty was given: and wherein, though other lawes are made revocable according to the proviſion of the former law with ſome new forme preſcribed, yet that very Law of revocation, together with pardons, is

14. El. Dy. 313. E. Com. 563.

made irrevocable and perpetuall, ſo that there is a direct contrariety betweene theſe two lawes: for if the former ſtands, which maketh all latter lawes during the minority of Kings revocable without exception of any law whatſoever, then that very law of repeale is concluded in the generality, and ſo it ſelfe made revocable: on the other ſide, that law making no doubt of the abſolute repeale of the firſt law, though it ſelfe were made during the minority, which was the very caſe of the former law in the new proviſion which it maketh, hath a preciſe exception, that the law of repeale ſhall not be repealed.

But the law is, that the firſt law by the impertinency of it was void *ab initio & ipſa facto* without repeale, as if a law were made, that no new ſtatute ſhould bee made during ſeven yeares, and the ſame ſtatute bee repealed within the ſeven yeares, if the firſt ſtatute ſhould be good, then the repeale could not bee made thereof within that time; for the law of repeale were a new law, and that were diſabled by the former law, therefore it is void in it ſelfe, and the rule holds, *perpetua lex eſt nullam legem humanam ac poſitivam perpetuam eſſe, & clauſula quæ abrogationem excludit initio non valet.*

Neither is the difference of the civill law ſo reaſonable as colourable, for they diſtinguiſh and ſay that a derogatory clauſe is good to diſable any latter act, except you revoke the ſame clauſe before you proceed to eſtabliſh any latter diſpoſition, or declaration; for they ſay, that *clauſula*

derogatoria

derogatoria ad alias ſequentes voluntates poſita in teſtamento (viz. ſi teſtator dicat qd' ſi contigerit eum facere aliud teſtamentum non vult illud valere) operatur quod ſequens diſpoſitio ab ipſa clauſula reguletur, & per conſequens quod ſequens diſpoſitio duretur ſine voluntate, & ſic quod non ſit attendendum. The ſenſe is, that where a former will is made, and after a later will, the reaſon why without an expreſſe revocation of the former will it is by implication revoked, is becauſe of the repugnancy betweene the diſpoſition of the former and the later.

But where there is ſuch a derogatory clauſe, there can bee gathered no ſuch repugnancy, becauſe it ſeemeth that the teſtator had a purpoſe at the making of the firſt will to make ſome ſhew of a new will, which nevertheleſſe his intention was ſhould not take place: but this was anſwered before; for if that clauſe were allowed to bee good untill a revocation, then would no revocation at all bee made, therefore it muſt needs bee void by operation of law at firſt. Thus much of *Clauſula derogatoria.*

Actus inceptus, cujus perfectio pendet ex voluntate partium, revocari poteſt; ſi autem pendet ex voluntate tertiæ perſonæ, vel ex contigenti, non poteſt. Regula 20.

IN Acts that are fully executed and conſummate, the law makes this difference, that if the firſt parties have put it in the power of a third perſon, or of a contigency, to give a perfection to their acts,

acts, then they have put it out of their owne reach and liberty; therefore there is no reason they should revoke them: but if the consummation depend upon the same consent, which was the inception, then the Law accounteth it in vaine to restraine them from revoking of it, for as they may frustrate it by omission, and *non feisance*, at a certaine time or in a certaine sort, or circumstance, so the law permitteth them to dissolve it by an expresse consent, before that time, or without that circumstance.

Therefore if two exchange land by deed, or without deed, and neither enter, they may make
F.N.Br.36. a revocation or dissolution of the same exchange
13.H.7. 13.14 by mutuall consent, so it be by deed, but not by paroll, for as much as the making of an exchange needeth no deed, because it is to bee perfected by entry, which is a ceremony notorious in the nature of a livery; but it cannot be dissolved but by deed, because it dischargeth that which is but little.

E.56.Eliz. So if I contract with I. D. that if hee lay me into my seller three tunnes of wine before Mich. that I will bring into his Garner 20. quarters of wheat before Christmas, before either of these daies the parties may by assent dissolve the contract; but after the first day there is a perfection given to the contract by action on the one side, and they may make crosse releases by deed or paroll, but never dissolve the contract; for there is a difference betweene dissolving the contract and release or surrender of the thing contracted for: as if lessee for 20. yeares make a lease for 10. yeares, and after he take

take a leaſe for five yeares, yet this cannot inure by way of ſurrender: for a petty leaſe derived out of a greater cannot be ſurrendred back againe, but inureth onely by diſſolution of contract; for a leaſe of land is but a contract executory from time to time of the profits of the land, to ariſe as a man may ſell his corne or his tythe to ſpring or to be perceived for divers future yeares.

But to returne from our digreſſion, on the other ſide, if I contract with you for cloth at ſuch a price as I. S. ſhall name; there if I. S. refuſe to name, the contract is voyd, but the parties cannot diſcharge it, becauſe they have put it in the power of the third perſon to perfect.

So if I grant my reverſion, though this be an imperfect act before atturnement, yet becauſe the atturnment is the act of a ſtranger, this is not ſimply revokable, but by a policy or circumſtance in law, as by levying a fine, or making a bargaine and ſale, or the like. 11. H. 7. 19. 1. R. 2. F. atturnmēt. 8.

So if I preſent a Clerke to the Biſhop, now can I not revoke this preſentation, becauſe I have put it out of my ſelfe, that is the Biſhop by admiſſion to perfect my act begun. 31. Ed. 1. F. Q. Imp. 185. 14. Ed. 4. 2. 38. Ed. 3. 35.

The ſame difference appeareth in nominations and elections; as if I enfeoffe ſuch a one as I. D. ſhall name within a yeare, and I. D. name I. B. yet before the feoffement and within the yeare I. D. may countermand his nomination and name againe, becauſe no intereſt paſſeth out of him. But if I enfeoffe I. S. to the uſe of ſuch a one as I. D. ſhall name within a yeare, then if I. D. name 14. Ed. 4. 2.

I. B. it is not revocable, becauſe the uſe paſſeth preſently by operation of law.

So in judiciall acts the rule of the civill law holdeth, *ſententia interlocutoria revocari poteſt*; that is, that an order may be revoked, but a judgement cannot; and the reaſon is, becauſe there is a title of execution or barre given preſently unto the partie upon judgement, and ſo it is out of the Judge to revoke in Courts ordered by the common law.

Regula 21. *Clauſula vel diſpoſitio inutilis per præſumptionem remotam vel cauſam, ex poſt facto non fulcitur.*

Clauſula vel diſpoſitio inutilis are ſaid, when the act or the words doe worke or expreſſe no more than the law by intendment would have ſupplied; and therefore the doubling or iterating of that and no more, which the conceit of law doth in a ſort prevent and preoccupate, is reputed nugation, and is not ſupported and made of ſubſtance either by a forreine intendment of ſome purpoſe, in regard whereof it might be materiall, nor upon any cauſe emerging afterwards, which may induce an operation of thoſe idle words.

32. H. 8. Goord 39. Ber. 2. M. Br. deviſes 41. And therefore if a man demiſe land at this day to his ſonne and heire, this is a voyd deviſe, becauſe the diſpoſition of law did caſt the ſame upon the heire by deſcent, and yet if it be Knights

ſervice

ſervice land, and the heire within age, if he take by the deviſe he ſhall have two parts of the profits to his owne uſe, and the guardian ſhall have benefit but of the third; but if a man deviſe land to his two daughters, having no ſonnes, then the deviſe is good, becauſe he doth alter the diſpoſition of law, for by the law they ſhall take in coparcenary, but by the deviſe they ſhall take joyntly, and this is not any forreine collaterall purpoſe, but in point of taking of eſtate. 29. H. 8. Dy. 12

So if a man make a feoffement in fee, to the uſe of his laſt will and teſtament, theſe words of ſpeciall limitation are voyd, and the law reſerveth the ancient uſe to the feoffer and his heires: and yet if the words might ſtand, then might it bee authoritie by his will to declare and appoint uſes, and then though it were Knights ſervice land, hee might diſpoſe the whole. As if a man make a feoffement in fee, to the uſe of the will and teſtament of a ſtranger, there the ſtranger may declare an uſe of the whole by his will, notwithſtanding it be Knights ſervice land, but the reaſon of the principall caſe is, becauſe uſes before the ſtatute of 27. *H.* 8. were to have beene diſpoſed by will, and therefore before that ſtatute an uſe limited in the forme aforeſaid, was but a frivolous limitation, in regard of the old uſe that the law reſerved was deviſable; and the ſtatute of 27. altereth not the law, as to the creating and limiting of any uſe, and therefore after that ſtatute, and before the ſtatute of wills, when no land could have beene deviſed, 19. H. 8. 11. 5. Ed. 4. 8.

yet was it a voyd limitation as before, and ſo continueth to this day.

But if I make a feoffement in fee, to the uſe of my laſt will and teſtament, thereby to declare an eſtate taile and no greater eſtate; and after my death and after ſuch eſtate declared ſhall expire, or in default of ſuch declaration than to the uſe of I. S. and his heires, this is a good limitation, and I may by my will declare an uſe of the whole land to a ſtranger, though it be held in Knights ſervice, and yet I have an eſtate in fee ſimple by vertue of the old uſe during life.

19. H. 8. 11.
6. Ed. 4. 8.

So if I make a feoffement in fee to the uſe of my right heires, this is a voyd limitation, and the uſe reſerved by the law doth take place, and yet if the limitation ſhould be good the heire ſhould come in by way of purchaſe, who otherwiſe commeth in by deſcent, but this is but a circumſtance which the law reſpecteth not, as was proved before.

32. H. 8. 43. Dy.
20. H. 8. 8. Dy.
7. Eliz. 237. Dy

But if I make a feoffement in fee to the uſe of my right heires, and the right heires of I. S. this is a good uſe, becauſe I have altered the diſpoſition of law; neither is it voyd for a moitie, but both our right heires when they come in being ſhall take by joynt purchaſe, and he to whom the firſt falleth ſhall take the whole ſubject, nevertheleſſe to his companions titles, ſo it have not deſcended from the firſt heire to the heire of the heire: for a man cannot be joynt tenant claiming by purchaſe, and the other by deſcent, becauſe they be ſeverall titles.

10. El. 274. Dy.

2. Ed. 3. 29.
30. E. 1. Fitz. Deviſe. 9.

So

So if a man having land on the part of his Mother make a feoffement in fee to the uſe of himſelfe and his heires, this uſe though expreſſed, ſhall not goe to him and the heires of the part of his Father as a new purchaſe, no more than it ſhould have done if it had beene a feoffement in fee nakedly without conſideration, for the intendment is remote. But if baron and feme be, and they joyne in a fine of the femes land, and expreſſe an uſe to the husband and wife and their heires: this limitation ſhall give a joynt eſtate by intierties to them both, becauſe the intendment of law would have conveyed the uſe to the feme alone. And thus much touching forreine intendments.

4. M. 133. pl. 6. Dyer.

5. Ed. 4. 8. 19. H. 8. 11.

For matter *ex poſt facto*, if a leaſe for life be made to two, and the ſurvivor of them, and they after make partition: now theſe words (and the ſurvivor of them) ſhould ſeeme to carry purpoſe as a limitation, that either of them ſhould be ſtated of his part for both their lives ſeverally; but yet the law at the firſt conſtrueth the words but words of dilating to deſcribe a joynt eſtate; and if one of them dye after partition there ſhall be no occupant, but his part ſhall revert.

30. aſſ. 8. Fitz. part. 16.

31. H. 8. 46. p. 7. D.

So if a man grant a rent charge out of ten acres, and grant further that the whole rent ſhall iſſue out of every acre, and diſtreſſe accordingly, and afterwards the grantee purchaſe an acre: now this clauſe ſhould ſeeme to be materiall to uphold the rent; but yet nevertheleſſe the law at firſt accepteth of theſe words but as words of explana-

tion, and then notwithſtanding the whole rent is extinct.

So if a gift intaile be made upon condition, that if tenant intaile dye without iſſue, it ſhall be lawfull for the donor to enter and the donee diſcontinue and dye without iſſue: now this condition ſhould ſeeme materiall to give him benefit of entry, but becauſe it did at the firſt limit the eſtate according to the limitation of law, it worketh nothing upon this matter emergent afterward.

4.E.6.Com.33 per Hinde. 27.H.8.6.

So if a gift in taile bee made of lands held in Knights ſervice with an expreſſe reſervation of the ſame ſervice, whereby the land is held over, and the gift is with warranty, and the land is evicted, and other land recovered in value againſt the donor held in ſoccage, now the tenure which the law makes betweene the donor and donee ſhall be in ſoccage, and not in Knights ſervice, becauſe the firſt reſervation was according to the owelty of ſervice, which was no more than the law would have reſerved.

22.Aſſ. pl.52.

But if a gift intaile had beene made of lands held in ſoccage with a reſervation of Knights ſervice tenure, and with warranty, then becauſe the intendment of law is altered, the new land ſhall be held by the ſame ſervice the laſt land was, without any regard at all to the tenure paramount: and thus much of matter *ex poſt facto*.

This Rule faileth where that the law ſaith as much as the partie, but upon forreine matter not pregnant and appearing upon the ſame act, and

conveyance,

conveyance, as if leſſee for life be, and he lets for twentie yeares, if he live ſo long; this limitation (if he live ſo long) is no more than the law ſaith, but it doth not appeare upon the ſame conveyance or act, that this limitation is nugatory, but it is forreine matter in reſpect of the truth of the ſtate whence the leaſe is derived: and therefore if leſſee for life make a feoffement in fee, yet the ſtate of the leaſe for yeares is not enlarged againſt the feoffee, otherwiſe had it beene if ſuch limitation had not beene but that it had beene left onely to the law.

16. H. 7. 4. per Keble. 24. Ed. 3. 28. Fitz. pl. 98.

So if tenant after poſſibilitie make a leaſe for yeares, and the donor confirmes to the leſſee to hold without impeachment of waſte during the life of tenant in taile, this is no more than the law ſaith, but the privilege of tenant after poſſibilitie is forreine matter, as to the leaſe and confirmation: and therefore if tenant after poſſibilitie doe ſurrender, yet the leſſee ſhall hold diſpuniſhable of waſte; otherwiſe had it beene if no ſuch confirmation at all had beene made.

Alſo heed muſt be given that it be indeed the ſame thing which the law intendeth, and which the partie expreſſeth, and not like or reſembling, and ſuch as may ſtand both together: for if I let land for life rendring a rent, and by my deed warrant the ſame land, this warranty in law and warranty in deed are not the ſame thing, but may both ſtand together.

20. Ed. 2. Fitz. 7 21. E. 1. Zouch. 289.

There remaineth yet a great queſtion on this rule.

A principall reaſon whereupon this rule is built, ſhould ſeeme to be becauſe ſuch acts or clauſes are thought to be but declaratory and added upon ignorance and *ex conſuetudine Clericorum* upon obſerving of a common forme, and not upon purpoſe or meaning, and therefore whether by particular and preciſe words a man may not controule the intendment of the law.

To this I anſwer, that no preciſe or expreſſe words will controule this intendment of law; but as the generall words are voyd, becauſe they ſay contrary to that the law ſaith; ſo are they which are thought to be againſt the law: and therefore if I demiſe my land being Knights ſervice tenure to my heire, and expreſſe my intention to be, that the one part ſhould deſcend to him as the third appointed by ſtatute, and the other he ſhall take by deviſe to his owne uſe, yet this is voyd; for the law ſaith he is in by diſcent of the whole, and I ſay, he ſhall be in by deviſe, which is againſt the Law.

Lit. pl. 362. But if I make a gift intaile, and ſay upon condition, that if tenant intaile diſcontinue and after dye without iſſue, it ſhall be lawfull for me to enter; this is a good clauſe to make a condition, becauſe it is but in one caſe, and doth not croſſe the law generally: for if the tenant intaile in that caſe be diſſeiſed and a deſcent caſt, and dye without iſſue, I that am the donor ſhall not enter.

But if the clauſe had beene provided, that if tenant intaile diſcontinue, or ſuffer a deſcent, or doe

doe any other fact whatsoever, that after his death without issue it shall be lawfull for me to enter: now this is a void condition, for it importeth a repugnancy to law: as if I would over-rule that where the law saith I am put to my action, I nevertheless will reserve to my selfe an entry.

Non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit. Regula 22.

ALthough choice and election bee a badge of consent, yet if the first ground of the act be duresse, the law will not construe that the duresse doth determine, if the party duressed doe make any motion or offer.

Therefore if a party menace me, except I make unto him a bond of 40.l. and I tell him that I will not doe it, but I will make unto him a bond of 20.l. the law shall not expound this bond to be voluntary, but shall rather make construction that my mind and courage is not to enter into the greater bond for any menace, and yet that I enter by compulsion, notwithstanding, into the lesser.

But if I will draw any consideration to my selfe, as if I had said, I will enter into your bond of 40 l. if you will deliver me that peece of Plate, now the duresse is discharged, and yet if it had beene moved from the duressor, who had said at the first, you shall take this peece of Plate, and make me a bond of 40. l. now the gift of the Plate

had beene good, and yet the bond ſhall be avoyded by dureſſe.

Regula 23. *Ambiguitas verborum Latens verificatione ſuppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.*

THere be two ſorts of ambiguities of words, the one is *Ambiguitas Patens*, and the other *Latens*. *Patens* is that which appeares to be ambiguous upon the deed or inſtrument, *Latens* is that which ſeemeth certaine and without ambiguity, for any thing that appeareth upon the deed or inſtrument; but there is ſome collaterall matter out of the deed, that breedeth the ambiguity.

Ambiguitas Patens is never holpen by averrement, and the reaſon is, becauſe the law will not couple and mingle matter of ſpecialty, which is of the higher account, with matter of averrement, which is of inferiour account in law; for that were to make all deeds hollow, and ſubject to averrements, and ſo in effect, that to paſſe without deed, which the law appointeth ſhall not paſſe but by deed.

Therefore if a man give land to *I.D. & I.S. & haredibus*, and doe not limit to whether of their heires, it ſhall not be ſupplied by averrement to whether of them the intention was, the inheritance ſhould be limited.

So if a man give land in taile, though it be by will,

will, the remainder in taile, and adde a *Proviſo*, in this manner: Provided that if hee, or they, or any of them doe any &c. according to the uſuall clauſes of perpetuities, it cannot be averred upon the ambiguities of the reference of this clauſe, that the intent of the deviſor was, that the reſtraint ſhould goe onely to him in the remainder, and the heires of his body; and that the tenant in taile in poſſeſſion, was meant to be at large.

Of theſe, infinite caſes might be put, for it holdeth generally that all ambiguity of words by matter within the deed, and not out of the deed, ſhall be holpen by conſtruction, or in ſome caſe by election, but never by averrement, but rather ſhall make the deed voyd for uncertainty.

But if it bee *Ambiguitas latens*, then otherwiſe it is: as if I grant my Mannour of S. to I. F. and his heires, here appeareth no ambiguity at all; but if the truth be, that I have the Mannours both of South S. and North S. this ambiguity is matter in fact, and therefore it ſhall be holpen by averrement, whether of them was that the party intended ſhould paſſe.

So if I ſet forth my land by quantity, then it ſhall be ſupplied by election, and not averrement.

As if I grant ten acres of wood in ſale, where I have an hundred acres, whether I ſay it in my deed or no, that I grant out of my hundred acres, yet here ſhall be an election in the grantee, which ten hee will take.

And the reaſon is plaine, for the preſumption

of the law is, where the thing is onely nominated by quantity, that the parties had indifferent intentions, which ſhould be taken, and there being no cauſe to help the uncertainty by intention, it ſhall be holpen by election.

But in the former caſe the difference holdeth, where it is expreſſed, and where not; for if I recite, Whereas I am ſeiſed of the Mannour of North S. and South S. I leaſe unto you *unum manerium de S.* there it is cleerely an election: ſo if I recite, Where I have two tenements in St. *Dunſtans*, I leaſe unto you *unum tenementum*, there it is an election, not averrement of intention, except the intent were of an election, which may be ſpecially averred.

Another ſort of *Ambiguitas latens* is correlative unto theſe: for this ambiguity ſpoken of before, is when one name and appellation doth denominate divers things, and the ſecond, when the ſame thing is called by divers names.

As if I give lands to Chriſt-Church in Oxford, and the name of the Corporation is *Eccleſia Chriſti in Univerſitate Oxford*, this ſhall be holpen by averment, becauſe there appeares no ambiguity in the words: for this variance is matter in fact, but the averrement ſhall not be of intention, becauſe it doth ſtand with the words.

For in the caſe of equivocation the generall intent includes both the ſpeciall, and therefore ſtands with the words: but ſo it is not in variance, and therefore the averrement muſt bee of matter,

matter, that doe endure quantity, and not intention.

As to say of the precinct of Oxford, and of the Universsity of Oxford is one and the same, and not to say that the intention of the parties was, that the grant should be to Christ-Church in that Universsity of Oxford.

Licita bene miscentur, formula nisi juris obstet. Regula 24.

THe law giveth that favour to lawfull acts, that although they be executed by severall authorities, yet the whole act is good.

As when tenant for life is the remainder in fee, and they joine in a livery by deed or without, this is one good entire livery drawne from them both, and doth not inure to a surrender of the particular estate if it be without deed or confirmation of those in the remainder, if it be by deed, but they are all parties to the livery.

Semble clerement le ley d'estre contrary in ambideux cases, car lou est sans fait est livery solement de cestui in le rem' & surr' de partic' ten' auterment serra forfeiture de son estate, & lou est per fait le livery passa solement de tenant, car ilad le franktenement, vide accordant Snr Co l 1.79 b 77.a. Com Plow. 59.A 40.2.H.5.7. 13.H.7.14. 13.E.4.4.a. 27.H 8.13.M.16.&.17.El.Dy.339.

So if tenant for life the remainder in fee be, and they joine in granting a rent, this is one solid rent out of both their estates, and no double rent, or rent by confirmation.

So if tenant in taile be at this day, and he make a lease for three lives, and his owne, this is a good

Quære. leaſe and warranted by the ſtatute of 32. H.8. and yet it is good in part by the authority which tenant in taile hath by the common law, that is, for his owne life, and in part by the authority which he hath by the ſtatute, that is, for the other three lives.

So if a man ſeiſed of lands deviſeable by cuſtome, and of other land held in Knights ſervice, and deviſe all his lands, this is a good deviſe of all the land cuſtomary by the common law, and of two parts of the other land by the ſtatutes.

So in the Star-chamber a ſentence may be good, grounded in part upon the authority given the Court by the Statute of 3. H. 7. and in part upon that ancient authority which the Court hath by the common law, and ſo upon ſeverall Commiſſions.

But if there be any forme which law appointeth to be obſerved, which cannot agree with the diverſities of authorities, then this rule faileth.

As if three Coparceners be, and one of them alien her purparty, the feoffee and one of the ſiſters cannot joyne in a writ *de part' faciendâ*, becauſe it behooveth the feoffee to mention the ſtatute in his writ.

Vide 1. Inſtit. 166.b.

Regula 25. *Præſentia corporis tollit errorem Nominis, & veritas nominis tollit errorem Demonſtrationis.*

THere be three degrees of certainty.

1 Preſence.

2 Name.

2 Name.

3 Demonſtration or Reference.

Whereof the Preſence the law holdeth of greateſt dignity, the Name in the ſecond degree, and the Demonſtration or Reference in the loweſt, and alwaies the errour or falſity in the leſſe worthy.

And therefore if I give a horſe to I. D. being preſent, and ſay unto him, I. S. take this; this is a good gift, notwithſtanding I call him by a wrong name: but ſo had it not beene if I had delivered him to a ſtranger to the uſe of I. S. where I meant I. D.

So if I ſay unto I. S. here I give you my Ring with the Ruby, and deliver it with my hand, and the Ring beare a Diamond and no Ruby, this is a good gift notwithſtanding I name it amiſſe.

So had it beene if by word or writing, without the delivery of the thing it ſelfe, I had given the Ring with the Ruby, although I had no ſuch, but only one with a Diamond which I meant, yet it would have paſſed.

So if I by deed grant unto you by generall words all the lands that the King hath paſſed unto me by letters Patents dated 10. May unto this preſent Indenture annexed, and the Patent annexed have date 10. July, yet if it be proved that that was the true Patent annexed, the preſence of the Patent maketh the errour of the date recited not materiall; yet if no Patent had been annexed, and there had beene alſo no other certainty given, but the reference of the Patent, the date whereof

was

was mis-recited, although I had no other Patent ever of the King, yet nothing would have passed.

Like law is it, but more doubtfull, where there is not a presence, but a kinde of representation, which is lesse worthy then a presence, and yet more worthy then a Name or Reference.

As if I covenant with my Ward, that I will tender unto him no other marriage, then the Gentlewoman whose picture I delivered him, and that picture hath about it *Ætatis suæ anno* 16. and the Gentlewoman is seventeene yeares old, yet nevertheless if it can be proved that the picture was made for that Gentlewoman, I may, notwithstanding this mistaking, tender her well enough.

So if I grant you for life a way over my land, according to a plot intended betweene us, and after I grant unto you and your heires a way according to the first plot intended, whereof a table is annexed to these presents, and there be some speciall variance betweene the table and the originall plot, yet this representation shall be certainty sufficient to lead unto the first plot, and you shall have the way in fee nevertheless, according to the first plot, and not according to the table.

So if I grant unto you by generall words the land which the King hath granted me by his letters patents, *Quarum tenor sequitur in hæc verba, &c.* and there be some mistaking in the recitall and variance from the originall patent, although it be in a point materiall, yet the representation of this whole Patent shall be as the annexing of the true

Patent,

patent, and the grant ſhall not be void by this variance.

Now for the ſecond part of this rule touching the Name and the Reference, for the explaining thereof, it muſt be noted what things ſound in demonſtration or addition: as firſt in lands, the greateſt certainty is, where the land hath a name proper, as the mannor of Dale, Grandfield, &c. the next is equall to that, when the land is ſet forth by bounds and abuttals, as a cloſe of paſture bounding on the Eaſt part upon Emſden-wood, on the South upon, &c. It is alſo a ſufficient name to lay the generall boundary, that is, ſome place of larger precinct, if there be no other land to paſſe in the ſame precinct, as, all my lands in Dale, my tenement in S. Dunſtans Pariſh, &c.

A farther ſort of denomination is to name land by the attendancy they have to other lands more notorious, as parcell of my manour of D. belonging to ſuch a Colledge lying upon Thames banke.

All theſe things are notes found in denomination of lands, becauſe they be ſignes to call, and therefore of property to ſignifie and name a place; but theſe notes that ſound onely in demonſtration and addition, are ſuch as are but tranſitory and accidentall to the nature of the place.

As *modo in tenura & occupatione*, of the proprietary tenure or poſſeſſor, is but a thing tranſitory in reſpect of land; *Generatio venit, generatio migrat, terra autem manet in æternum.*

So likewise matter of conveyance, title, or instrument.

As, *quæ perquisivi de I. D. quæ descendebant à I. N. patre meo*, or, *in prædicta Indentura dimissionis*, or, *in prædictis literis patentibus specificat'*.

So likewise *continent' per æstimationem 20. acras*, or if (*per æstimationem*) be left out, all is one, for it is understood, and this matter of measure, although it seeme locall, yet it is indeed but opinion and observation of men.

The distinction being made, the rule is to be examined by it.

Therefore if I grant my close called Dale in the Parish of Hurst, in the County of Southampton, and the Parish likewise extendeth into the County of Barkshire, and the whole close of Dale lyeth in the County of Barkshire, yet because the parcell is especially named, the falsitie of the addition hurteth not, and yet this addition is found in name, but (as it was said) it was lesse worthy than a proper name.

So if I grant *tenementum meum*, or *omnia tenementa mea* (for the universall and indefinite to this purpose are all one) *in parochia Sancti Butolphi extra Aldgate* (where the verity is *extra Bishopsgate*) *in tenura Guilielmi*, which is true, yet this grant is void, because that which sounds in denomination is false, which is the more worthy; and that which sounds in addition is true, which is the lesse; * and though *in tenura Guilielmi*, which is true, had beene first placed, yet it had been all one.

*Semble icy le grant ust este assets bon, cõe fuit resolu per Cur', Co. lib. 3 fo. 10. a. vid. 33 H. 8 Dy. 50. b. 12. El. ib. 292. b. & Co. lib. 2. fo. 33. a.

But

But if I grant *tenementum meum quod perquisivi de R.C. in Dale*, where the truth was T.C. and I have no other tenements in D. but one, this grant is good, because that which foundeth in name (*viz.* in Dale) is true, and that which founded in addition (*viz. quod perquisivi, &c.*) is onely false.

Vide ib. quæ contraria est lex, car icy auxi le pri ner certainty est faux.

So if I grant *Prata mea in Sale continentia* 10. *acras*, and they containe indeed 20. acres, the whole 20. passe.

So if I grant all my lands, being parcells *manerii de D. in prædictis literis patentibus specificat'*, and there be no letters patents, yet the grant is good enough.

The like reason holds in demonstrations of persons that have beene declared in demonstration of lands and places, the proper name of every one is in certaintie worthiest, next are such appellations as are fixed to his person, or at least of continuance, as sonne of such a man, wife of such a husband; or addition of office, as Clerk of such a Court, &c. and the third are actions or accidents, which sound no way in appellation or name, but onely in circumstance, which are lesse worthy, although they may have a poore particular reference to the intention of the grant.

And therefore if an obligation bee made to I.S. *filio & haredi G.S.* where indeed he is a bastard, yet this obligation is good.

So if I grant land *Episcopo nunc Londinensi qui me erudivit in pueritia*, this is a good grant,

although he never inſtructed me.

But *è converſo*, if I grant land to I. S. *filio & heredi G. S.* and it bee true that hee is ſonne and heire unto G. S. but his name is Thomas, this is a void grant.

Or if in the former grant it was the Biſhop of Canterbury who taught me in my childhood, yet ſhall it be good (as was ſaid) to the Biſhop of London, and not to the Biſhop of Canterbury.

The ſame rule holdeth of denomination of times, which are ſuch a day of the moneth, ſuch a day of the week, ſuch a Saints day or Eve, To day, to morrow; theſe are names of times.

But the day that I was borne, the day that I was married; theſe are but circumſtances and addition of times.

And therefore if I binde my ſelfe to doe ſome perſonall attendance upon you, upon Innocents day being the day of your birth, and you were not born that day, yet ſhall I attend.

There reſteth two queſtions of difficulty yet upon this rule: firſt, of ſuch things whereof men take not ſo much note as that they ſhall faile of this diſtinction of name and addition.

As, my boxe of Ivorie lying in my ſtudy ſealed up with my ſeale of armes, my ſuit of arras with the ſtory of the Nativitie and Paſsion, of ſuch things there can be no name, but all is of deſcription, and of circumſtance, and of theſe I hold the law to be, that preciſe truth of all recited circumſtances is not required.

But in such things *ex multitudine signorum colligitur identitas vera*, therefore though my boxe were sealed, and although the arras had the story of the nativity, and not of the passion, if I had no other boxe, nor no other suit, the gifts are good, and there is certainty sufficient, for the law doth not expect a precise description of such things as have no certain denomination.

Secondly, of such things as doe admit the distinction of name and addition, but the notes fall out to bee of equall dignitie all of name or addition.

As, *prata mea juxta communem fossam in D.* whereof the one is true, the other false, or, *tenementum meum in tenura Guilielmi quod perquisivi de R.C. in prædict' Indent' specificat'*, whereof one is true, and two are false, or two are true and one false.

So *ad curiam quam tenebat die Mercurii tertio die Martii*, whereof the one is true, the other false.

In these cases the former rule *ex multitudine signorum, &c.* holdeth not, neither is the placing of the falsitie or veritie first or last materiall, but all must be true, or else the grant is voide, alwayes understood, that if you can reconcile all the words, and make no falsity, that is quite out of this rule, which hath place onely where there is a direct contrarietie, or falsitie not to be reconciled to this rule.

Vide livers avant dit pur ceſt auxi.

As if I grant all my land in D. *in tenura I.S.* which I purchased of I.N. specified in a devise to I.D. and I have land in D. whereof in part of

them all these circumstances are true, but I have other lands in D. wherein some of them faile, this grant will not passe all my land in D. for there these are references, and no words of falsity or errour, but of limitation and restraint.

FINIS.

THE USE OF THE LAW.

Provided for Preſervation

OF

Our { *Perſons*, *Goods*, and *Good Names*.

According to the practice

OF

The { *Lawes* and *Cuſtomes* } *of this Land.*

By the Lord Verulam Viſcount of S. *Albons*, &c.

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CUM PRIVILEGIO.

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CUM PRIVILEGIO.

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THE

THE USE OF THE LAVV;

And wherein it principally consisteth.

THe Use of the Law consisteth principally in these three things:

1. To secure Mens persons from Death and Violence.
2. To dispose the Property of their Goods and Lands.
3. For preservation of their good Names from shame and infamy.

Surety to keep the Peace.

FOr safety of persons, the Law provideth that any man standing in feare of another, may take his Oath before a Justice of Peace, that he standeth in feare of his life, and the Justice shall compell the other to be bound with Sureties to keep the Peace.

Action of the Case, for Slander, Battery, &c.

If any man beate, wound, or mayme another, or give false scandalous words that may touch his credit, the Law giveth thereupon an action of the

the Caſe, for the ſlander of his good name; and an Action of Battery, or an appeale of Maime, by which recompence ſhall be recovered, to the value of the hurt, dammage or danger.

Appeale of Murther given to the next of kinne.

If any man kill another with malice, the Law giveth an appeale to the wife of the dead, if hee had any, or to the next of kinne that is Heire in default of a Wife, by which appeale the Defendant convicted is to ſuffer Death, and to loſe all his Lands and Goods; But if the Wife or Heire will not ſue or be compounded withall, yet the King is to puniſh the offence by Indictment or Preſentment of a lawfull inqueſt and triall of the Offenders before competent Judges; whereupon being found guilty, he is to ſuffer Death, and to loſe his lands and goods.

Man-ſlaughter, and when a forfeiture of Goods, and when not.

If one kill another upon a ſudden quarrell, this is Man-ſlaughter, for which the Offender muſt die, except he can reade; and if he can reade, yet muſt he loſe his goods, but no lands.

And if a man kill another in his owne defence, he ſhall not loſe his Life, nor his Lands, but he muſt loſe his Goods, except the party ſlaine did firſt aſſault him, to kill, rob, or trouble him by the High-way ſide, or in his owne Houſe, and then he ſhall loſe nothing.

Felon. de ſe.

And if a man kill himſelfe, all his Goods and Chattels are forfeited, but no Lands.

Felony by miſchance.

If a man kill another by misfortune, as ſhooting an Arrow at a Butt or Marke, or caſting a Stone over an houſe, or the like, this is loſſe of his goods

and

and Chattels, but not of his lands, nor life.

If a Horſe, or Cart, or a Beaſt, or any other thing doe kill a man, the Horſe, Beaſt, or other thing, is forfeited to the Crowne, and is called a *Deodand*, and uſually granted and allowed by the King to the Biſhop Almner, as goods are of thoſe that kill themſelves. Deodand.

The Cutting out of a mans Tongue, or putting out his Eyes maliciouſly, is Felony; for which the offender is to ſuffer Death, and loſe his lands and goods. Cutting out of Tongues, and putting out of Eyes, made Felony.

But for that all puniſhment is for examples ſake, it is good to ſee the meanes whereby Offenders are drawne to their puniſhment; and firſt for matter of the peace.

THe ancient Lawes of England, planted here by the Conquerour, were, that there ſhould be Officers of two ſorts in all the parts of this Realme to preſerve the Peace:

1. *Conſtabularii* } *Pacis.*
2. *Conſervatores* }

The Office of the Conſtable was, to arreſt the parties that he had ſeene breaking the Peace, or in fury ready to breake the peace, or was truly informed by others, or by their owne confeſsion, The Office of the Conſtable.

that they had freshly broken the peace; which persons he might imprison in the Stockes, or in his owne house, as his or their quality required, untill they had become bounden with sureties to keepe the peace; which obligation from thenceforth was to be sealed and delivered to the Constable to the use of the King. And that the Constable was to send to the Kings Exchequer or Chancery, from whence Processe should be awarded to levy the debt, if the peace were broken.

But the Constable could not arrest any, nor make any put in Bond upon complaint of threatning onely, except they had seene them breaking the peace, or had come freshly after the peace was broken. Also, these Constables should keepe watch about the Towne for the apprehension of Rogues and Vagabonds, and Night-walkers, and Evesdroppers, Scouts, and such like, and such as goe Armed. And they ought likewise to raise hue and cry against Murtherers, Manslayers, Theeves and Rogues.

First, High Constables. Secondly, Petty Constables.

2. High Constables for every hundred.

1. Petty Constable for every Village.

Of this Office of Constable there were High Constables, two of every Hundred: Petty Constables one in every Village, they were in ancient time all appointed by the Sheriffe of the Shire yearely in his Court called the Sheriffes Tourne, and there they received their oath. But at this day they are appointed either in the Law-day of that Precinct wherein they serve, or else by the High Constable in the Sessions of the peace.

The

The Sheriffes Tourne is a Court very ancient, incident to his Office. At the first, it was erected by the Conquerour, and called the Kings-Bench appointing men studied in the Knowledge of the Lawes to execute justice, as substitutes to him in his name, which men are to be named, *Justiciarii ad placita coram Rege assignati*: One of them being *Capitalis Justiciarius* called to his fellowes; the rest in number as pleaseth the King, of late but three *Justiciarii*, holden by Patent. In this Court every man above twelve yeeres of age was to take his Oath of Allegeance to the King; if hee were bound, then his Lord to answer for him. In this Court the Constables were appointed and sworne; breakers of the peace punished by fine and imprisonment, the parties beaten or hurt recompenced upon complaints of dammages; All appeales of Murther, Maime, Robbery, decided; Contempts against the Crowne, publique annoyances against the people, Treasons and Felonies, and all other matters of wrong, betwixt party and party, for lands and goods.

The Kings Bench first instituted, and in what matters they anciently had jurisdiction.

But the King seeing the Realme grow daily more and more populous, and that this one Court could not dispatch all; did first ordaine that his Marshall should keepe a Court, for Controversies arising within the *Virge*. Which is within xii. miles of the chiefest Tunnell of the Court, which did but ease the Kings Bench in matters onely concerning Debts, Covenants, and such like, of those of the Kings houshold onely, never dealing in breaches of the Peace, or concerning the Crowne by

Court of Marshalsee erected, and its Jurisdiction within twelve miles of the chiefe Tunnell of the King, which is the full extent of the Virge.

any other persons, or any pleas of Lands. Insomuch, as the King for further ease having divided this Kingdome into Counties, and committing the Charge of every County to a Lord or Earle; did direct, that those Earles, within their limits should looke to the matter of the peace, and take charge of the Constables, and reforme publike annoyances, and sweare the people to the Crowne, and take pledges of the Freemen for their Allegeance: for which purpose the County did once every yeare keepe a Court, called the Sheriffs Tourne. At which all the County (except Women, Clergie, Children under twelve, and not aged above sixty) did appeare to give or renew their pledges for Allegeance. And the Court was called, *Curia Franci plegii*, A view of the pledges of Freemen; or, *Turnus Comitatus*.

Sheriffes Tourne instituted upon the division of England into Counties; the charge of this Court was committed to the Earle of the same Countie: this was likewise called *Curia visus fra. pleg.*

At which meeting or Court, there fell by occasion of great Assemblies much bloud-shed, scarcity of Victuals, Mutinies, and the like mischiefs which are incident to the Congregations of people, by which the King was moved to allow a subdivision of every County into Hundreds, and every Hundred to have a Court, whereunto the people of every Hundred should bee assembled twice a yeare for surveigh of Pledges, and use of that Justice which was formerly executed in that grand Court for the County; and the Count or Earle appointed a Bayliffe under him to keepe the hundred Court. But in the end, the Kings of this Realme found it necessary to have all execution of Justice immediately from themselves, by such as

Subdivision of the Countie Court into Hundreds.

were

were more bound then Earles to that ſervice, and readily ſubject to correction for their negligence or abuſe; and therefore tooke to themſelves the appointing of a Sheriffe yearely in every Countie, calling them *Vicecomites*, and to them directed ſuch writs and precepts for executing Juſtice in the County, as fell out needfull to have beene diſpatched, committing to the Sheriffe *Cuſtodiam Comitatus*; by which the Earles were ſpared of their toiles and labours, and that was laid upon the Sheriffes. So as now the Sheriffe doth all the Kings buſineſſe in the Countie, and that is now called the Sheriffes Tourne; that is to ſay, he is Judge of this grand Court for the Countie, and alſo of all Hundred Courts not given away from the Crowne.

The charge of the County taken from the Earles, and committed yearly to ſuch perſons as it pleaſed the King.

The Sheriffe is Judge of all Hundred Courts not given away from the Crowne.

Hee hath another Court, called the Countie Court, belonging to his office, wherein men may ſue monethly for any debt or dammages under 40. l. and may have writs for to replevy their cattell diſtrained and impounded by others, and there try the cauſe of their diſtreſſe; and by a Writ called *Juſticies*, a man may ſue for any ſumme, and in this Court the Sheriffe by a Writ, called an Exigent, doth proclaime men ſued in Courts above, to render their bodies, or elſe they be Out-lawed.

County Court kept monethly by the Sheriffe.

This Sheriffe doth ſerve the Kings Writs of Proceſſe, be they Sommons, Attachments to compell men to anſwer to the Law, and all Writs of execution of the Law, according to Judgements of Superiour Court, for taking of Mens Goods, Lands, or Bodies, as the cauſe requireth.

The office of the Sheriffe.

The Hundred Courts, were moſt of them

Hundred Courts to whom they were at first granted.

granted to Religious men, Noble men, and others of great place. And alſo many men of good quality have attained by Charter, and ſome by uſage within Mannors of their own liberty of keeping Law-dayes, and to uſe there juſtice appertaining to a Law-day.

Lord of the Hundred to appoint two High Conſtables.

Whoſoever is Lord of the Hundred Court, is to appoint two high Conſtables of the Hundred, and alſo is to appoint in every Village, a Pettie Conſtable with a Tithing-man to attend in his abſence, and to be at his commandement when he is preſent in all ſervices of his office for his aſſiſtance.

There have beene by uſe and Statute Law (beſides ſurveying of the Pledges of Freemen, and giving the oath of Allegeance, and making Conſtables,) many additions of powers and authoritie given to the Stewards of Leets and Law-daies to be put in ure in their Courts; as for example, they may puniſh Inne-keepers, Victuallers, Bakers, Butchers, Poulterers, Fiſhmongers, and Tradeſmen of all ſorts, ſelling with under weights or meaſures, or at exceſſive prices, or things unwholſome, or ill made in deceipt of the people. They may puniſh thoſe that doe ſtop, ſtraiten, or annoy the high wayes, or doe not according to the proviſion enacted, repaire or amend them, or divert water courſes, or deſtroy frey of fiſh, or uſe engines or nets to take Deere, Conies, Pheſants, or Partridges, or build Pigeon houſes; except he be Lord of the Mannor, or Parſon of the Church. They may alſo take preſentment upon Oath of the xii. ſworne Jury before them of all felonies; but

Of what matters they enquire of in Leets and Law-dayes.

they

they cannot try the Malefactors, onely they must by Indenture deliver over those presentments of felonie to the Judges, when they come their circuits into that Countie. All those Courts before mentioned are in use, and exercised as Law at this day, concerning the Sheriffes Law-dayes and Leets, and the offices of High Constables, pettie Constables, and Tithingmen; howbeit, with some further additions by Statute lawes, laying charge upon them for taxation for poore, for Souldiers, and the like, and dealing without corruption, and the like.

Conservators of the Peace were in ancient times certaine, which were assigned by the King to see the Peace maintained, and they were called to the office by the Kings writ, to continue for term of their lives, or at the Kings pleasure.

Conservators of the Peace called by the Kings writ for terme of their lives, or at the Kings pleasure.

For this Service, choice was made of the best men of calling in the Countrie, and but few in the Shire. They might binde any man to keepe the peace, and to good behaviour, by Recognizance to the King with sureties, and they might by Warrant send for the party, directing their Warrant to the Sheriffe or Constable, as they please, to arrest the party, and bring him before them. This they used to doe, when complaint was made by any, that he stood in feare of another, and so tooke his Oath; or else, where the Conservator himselfe did without oath or complaint see the disposition of any man inclined to quarrell and breach of the Peace, or to mis-behave himselfe

Conservators of the Peace, and what their Office was.

himſelfe in ſome outrageous manner of force or fraud: There by his owne diſcretion hee might ſend for ſuch a fellow, and make him finde Sureties of the peace, or of his good behaviour, as he ſhould ſee cauſe; or elſe commit him to the Goale if hee refuſed.

Conſervators of the Peace by vertue of their Office.

The Judges of either Bench in Weſtminſter, Barons of the Exchequer, Maſter of the Rolles, and Juſtices in Eire and Aſſizes in their circuits, were all without writ Conſervators of the Peace in all Shires of England, and continue to this day.

Juſtices of Peace ordained in lieu of Conſervators, Power of placing and diſplacing Juſt. of Peace by uſe deligated from the King to the Chancellor.

But now at this day Conſervators of the Peace are out of uſe, and in lieu of them there are ordained Juſtices of Peace, aſſigned by the Kings Commiſſions in every Countie, which are moveable at the Kings pleaſure; but the power of placing and diſplacing Juſtices of the Peace is by uſe deligated from the King to the Chancellour.

That there ſhould bee Juſtices of Peace by Commiſſions, it was firſt enacted by a Statute made 1. *Edward* 3. and their Authority augmented by many ſtatutes made ſince in every Kings reigne.

[a] The power of the Juſt. of Peace to fine the Offenders to the Crown, and not to recompence the party grieved. Parl. Stat. 17. R. 2. cap. 10. & v. Dier 69. b. Ils ount poier d' inquier de murder car. ce Felon.

[a] They are appointed to keepe foure Seſſions every yeare; that is, every Quarter one. Theſe Seſſions are a ſitting of the Juſtices to diſpatch the affaires of their Commiſſions. They have power to heare and determine in their Seſſions, all Felonies, breaches of the Peace, Contempts and treſpaſſes, ſo farre as to fine the Offender to the Crowne, but not

to

to award recompence to the party grieved.

They are to ſuppreſſe Ryots, and Tumults, to reſtore Poſſeſſions forcibly taken away, to examine all Felons apprehended and brought before them; To ſee impotent poore people, or maymed Souldiers provided for, according to the Lawes. And Rogues, Vagabonds, and Beggers puniſhed. They are both to licence and ſuppreſſe Alehouſes, Badgers of Corne and Victuals, and to puniſh Foreſtallers, Regrators, and Engroſſers.

Authority of the Juſtices of Peace, through whom run all the County ſervices unto the Crown.

Though theſe in effect run all the County ſervices to the Crowne, as Taxations of Subſidies, Muſtring men, Arming them, and levying forces, that is done by a ſpeciall Commiſſion or Precept from the King. Any of theſe Juſtices by Oath taken by a man that he ſtandeth in fear that another man will beat him, or kill him, or burne his houſe, are to ſend for the party by warrant of Attachment directed to the Sheriff or Conſtable, & then to binde the party with ſureties by Recognizance to the King to keep the Peace, and alſo to appeare at the next Seſſions of the Peace; at which next Seſſions, when every Juſtice of Peace hath therin delivered all their Recognizances ſo taken, then the parties are called and the cauſe of binding to the Peace examined, and both parties being heard, the whole Bench is to determine as they ſee cauſe, either to continue the party ſo bound, or elſe to diſcharge him.

Beating, killing, burning of houſes.

Attachments for ſurety of the Peace.

Recognizance of the Peace delivered by the Juſtices at their Seſſions.

The Juſtices of Peace in their Seſſions, are attended by the Conſtables and Bailiffs of all Hundreds and liberties within the County, and by the

Quarter Seſſions held by the Juſtices of the Peace.

Sheriffe or his deputy, to be employed as occasion shall serve in executing the precepts & directions of the Court. They proceed in this sort; The Sheriff doth summon 24 free-holders, discreet men of the said County, wherof some 16 are selected and sworn, and have their charge to serve as the grand Jury, the party indicted is to traverse the indictment, or else to confesse it, and so submit himself to be fined as the Court shall think meet (regard had to the offence) except the punishment be certainly appointed (as often it is) by speciall Statutes.

The Justices of Peace are many in every County, and to them are brought all Traitors, Felons, and other malefactors of any sort upon their first apprehension, and that Justice to whom they are brought, examineth them, and heareth their accusations, but judgeth not upon it; onely if hee finde the suspition but light, then hee taketh bond with sureties of the accused, to appear either at the next Assises, if it be a matter of Treason or Felony; or else at the quarter Sessions, if it be concerning riot or mis-behaviour, or some other small offence. And hee also then bindeth to appeare those that give testimony and prosecute the accusation, all the accusers and witnesses, and so setteth the party at large. And at the Assizes or Sessions (as the case falleth out) he certifieth the Recognizances taken of the accused, accusers, and witnesses, who being there are called, and appearing, the cause of the accused is debated according to law for his cleering or condemning.

The authority of Justices of the Peace out of their Sessions.

But if the party accused, seeme upon pregnant mat-

matter in the accuſation and to the Juſtice to be guilty, and the offence heinous, or the offendor taken with the manner, then the Juſtice is to commit the party by his warrant called a *Mittimus* to the Gaoler of the common Gaole of the County, there to remayne untill the Aſſizes. And then the Juſtice is to certifie his accuſation, examination, and Recognizance taken for the appearances and proſecution of the witneſſes, ſo as the Judges may, when they come, readily proceed with him as the Law requireth.

Judges of Aſſize come in place of the ancient Judges in Eyre about the time of R. 2.

The Judges of the Aſſizes as they be now become into the place of the ancient Juſtices in Eyre, called *Juſticiarii itinerantes*, which in the prime Kings after the Conqueſt untill *H.* 3. time eſpecially, and after in leſſer meaſure even to *R.* 2. time, did execute the juſtice of the Realme; they began in this ſort.

1. Kings Bench.
2. Marſhals court
3. County Court.
4 Sheriffs Tournes.
5 Hundred Leets and Law-days.
All which dealt onely in Crowne matters, but the Juſtice in Eyre dealt in private titles of lands or goods, and in all Treaſons and Felonies, of whom there were 12. in number, the whole Realme being divided into ſix Circuits.

The King not able to diſpatch buſineſſe in his own perſon, erected the Court of Kings Bench; that not able to receive all, nor meet to draw the people all to one place, there were ordained Counties, and the Sheriffs Tourns, Hundred Courts, and particular Leets, and Law-dayes, as before mentioned, which dealt only with Crowne matters for the publique; but not the private titles of Lands, or Goods, nor the triall of grand offences of Treaſons and Felonies, but all the Counties of the Realme were divided into ſixe

The authority of Tournes, Leets, Hundreds, and Law-dayes, as it was confirmed to ſome ſpecial cauſes touching the publique good

England divided into six Circuits, and two learned men in the Laws, assigned by the Kings Commission to ride twice a yeare through those Shires allotted to that circuit, for their triall of private titles to lands and goods, and all Treasons and Felonies, which the County Courts meddle not in.

Circuits. And two learned men well read in the Laws of the Realme, were assigned by the Kings Commission to every Circuit, and to ride twice a a yeare through those shires allotted to that Circuit, making Proclamation before-hand, a convenient time, in every County, of the time of their commming, and place of their sitting, to the end the people might attend them in every County of that Circuit.

They were to stay three or foure days in every county, and in that time all the causes of that county were brought before them by the parties grieved, and all the Prisoners of the said Gaole in every Shire, and whatsoever controversies arising concerning life, lands or goods.

The authority translated by Parliament to Justices of Assize.

The authority of these Judges in Eyre, is in part translated by Act of Parliament to Justices of Assize; which be now the Judges of circuits, and they do use the same course that Justices in Eyre did, to proclaime their comming every halfe year, and the place of their sitting.

The authority of the Justices of Assizes much lessened by the Court of Common Pleas, erected in H. 3. time.

The Justices of Assize have at this day 5 Commissions by which they sit.
1. Oyer & Term.
2. Gaole delivery.
3. To take Assizes
4. To take Nisi p.
5. Of the Peace.

The busineſſe of the Justices in Eyre, and of the Justices of Assize at this day is much lessened, for that in *H.* 3. time there was erected the court of Common-pleas at Westminster, in which court have been ever since and yet are, begun and handled the great suits of Lands, Debts, Benefices and contracts, fines for assurance of Lands and recoveries, which were wont to be either in the Kings Bench, or else before the Justies in Eyre. But the Statute of *Mag. Char. Cap.* 11. 5. is negative against it. *Viz. Communia placita non se-*

sequantur Curiam nostram, sed teneantur in aliquo loco Certo; which *locus Certus* must be the Common-pleas; yet the Judges of Circuits have now five commissions by which they sit.

The first is a Commission of Oyer and Terminer, directed unto them, and many others of the best acccount, in their Circuits; but in this Commission the Judges of Assize are of the *Quorum*, so as without them there can be no proceeding.

Oyer and Terminer, in which the Judges are of the Quorum, and this is the largest Commission they have.

This commission giveth them power to deale with Treasons, Murthers, and all manner of Felonies and misdemeanours whatsoever; and this is the largest commission that they have.

The second is a commission of Gaole delivery; That is onely to the Judges themselves, and the Clerke of the Assize associate: And by this commission they are to deale with every Prisoner in the Gaole, for what offence soever hee be there. And to proceed with him according to the Laws of the Realme, and the qualitie of his offence; And they cannot by this Commission doe any thing concerning any man, but those that are Prisoners in the Gaole. The course now in use of execution of this Commission of Gaole delivery, is this. There is no prisoner but is committed by some Justice of Peace, who before hee committed him tooke his examination, and bound his accusers and witnesses to appeare and prosecute at the Gaole delivery. This Justice doth certifie these examinations and bonds, and thereupon the accuser is called solemnly into the Court, and when hee appeareth hee is willed to

Gaole delicery directed onely to Judges themselvs and the Clerk of the Assize.

prepare a Bill of indictment againſt the Priſoner, and goe with it to the grand Jury, and give evidence upon their oathes, hee and the witneſſes; which hee doth: and then the grand Jury write thereupon either *Billa vera*, and then the Priſoner ſtandeth indicted, or elſe *Ignoramus*, & then hee is not touched. The grand Jury deliver theſe Bils to the Judges in their Court, and ſo many as they finde indorſed *Billa vera*, they ſend for thoſe Priſoners, then is every mans indictment put and read to him, and they aske him whether hee be guilty or not: If he ſaith guilty, his confeſſion is recorded; if hee ſay not guilty, then hee is asked how he will be tried; hee anſwereth, by the Countrey. Then the Sheriffe is commanded to returne the names of twelve Free-holders to the Court, which Free-holders be ſworne to make true delivery betweene the King and the Priſoner, and then the indictment is againe read, and the Witneſſes ſworne to ſpeake their knowledge concerning the fact, and the Priſoner is heard at large what defence hee can make, and then the Jury goe together and conſult. And after a while they come in with a verdict of guilty or not guilty, which verdict the Judges doe record accordingly. If any Priſoner plead not guilty upon the indictment, and yet will not put himſelfe to tryall upon the Jury, (or ſtand mute) hee ſhall be preſſed.

The manner of the proceedings of the Juſtices of Circuits in their Circuits.

The courſe now in uſe with the Judges for the execution of the Commiſſion of Gaole delivery.

The Judges when many priſoners are in the Gaole, do in the end, before they goe, peruſe every one. Thoſe that were indicted by the grand

Jury,

Jury, and found not guilty by the ſelect Jury, they judge to be quitted, and ſo deliver them out of the Gaole. Thoſe that are found guilty by both Juries they judge to death, and command the Sheriffe to ſee execution done. Thoſe that refuſe triall by the Countrey, or ſtand mute upon the indictment, they judge to be preſſed to death: ſome whoſe offences are pilfering under twelve pence value, they judge to be whipped. Thoſe that confeſſe their indictments, they judge to death, whipping or otherwiſe, as their offence requireth And thoſe that are not indicted at all, but their bill of indictment returned with *Ignoramus* by the grand Jury, and all other in the Gaole againſt whom no bills at all are preferred, they doe acquit by Proclamation out of the Gaole; That one way or other they rid the Gaole of all the priſoners in it. But becauſe ſome priſoners have their bookes, and be burned in the hand, and ſo delivered, it is neceſſary to ſhew the reaſon therof. This having their bookes is called their Clergie, which in ancient time began thus.

Book allowed to Clergie for the ſcarcity of them, to be diſpoſed in religious houſes.

For the ſcarcity of the Clergy in the Realme of England, to be diſpoſed in Religious houſes, or for Prieſts, Deacons and Clerkes of Pariſhes, there was a prerogative allowed to the Clergie, that if any man that could reade as a Clerke, were to be condemned to death, the Biſhop of the Dioceſſe might if he would, claim him as a Clerk, and hee was to ſee him tried in the face of the Court.

Whe-

Whether he could reade or not, the Booke was prepared and brought by the Biſhop, and the Judge was to turne to ſome place as hee ſhould thinke meete, and if the priſoner could reade, then the Biſhop was to have him delivered over unto him to diſpoſe of in ſome places of the Clergie, as hee ſhould thinke meet. But if either the Biſhop would not demand him: or that the Priſoner could not reade, then was to be put to death.

Concerning the allowing of the Clergy to the priſoner.

Clergy allowed in all offences except Treaſon & robbing of Churches, and now taken away by many Statutes.

1. In Treaſon.
2. In Burglary.
3. Robbery.
4. Purſe-cutting.
5. Horſ-ſtealing,

and in divers other offences particularized in ſeverall Statutes.

By the Stat. of 18. Eliz. the Judges are appointed to allow Clergy, & to ſee them burned in the hand, & to diſcharge the priſoners without delivering them to the Biſhop.

And this Clergy was allowable in the ancient times and Law, for all offences whatſoever they were, except Treaſon and robbing of Churches their goods and ornaments. But by many Statutes made ſince, the Clergie is taken away for Murther, Burglary, Robbery, Purſe-cutting, Horſe-ſtealing, and divers other felonies particularized by the Statutes to the Judges; and laſtly, by a Statute made 18. *Elizabeth*, the Judges themſelves are appointed to allow Clergy to ſuch as can reade, being not ſuch offendors from whom Clergy is taken away by any Statute; and to ſee them burned in the hand, and ſo diſcharge them without delivering them to the Biſhop, howbeit the Biſhop appointeth the deputy to attend the Judges with a booke to try whether they could reade or not.

The third commiſſion that the Judges of Circuits have, is, a Commiſſion directed to themſelves onely and the Clerke of Aſſize to take Aſſizes, by which they are called Juſtices of Aſſize, and the office of thoſe Juſtices is to doe right upon

on Writs called Aſſizes, brought before them by ſuchas are wrongfully thruſt out of their Lands. Of which number of Writs there was far greater ſtore brought before them in ancient times then now, for that mens ſeizons and poſſeſſions are ſooner recovered by ſealing Leaſes upon the ground, and by bringing an *Ejectione firme*, and trying their title ſo, then by the long ſuites of Aſſizes.

The fourth Commiſſion, is a Commiſſion to take *Niſi Prius* directed to none but to the Judges themſelves and their Clerks of Aſſizes, by which they are called Juſtices of *Niſi Prius*. Theſe *Niſi Prius* happen in this ſort, when a ſuit is begunne for any matter in one of the three Courts, the Kings Bench, Common Pleas, or the Exchequer here above, and the parties in their pleadings doe vary in a point of fact; As for example, if in an action of debt upon obligation the defendant denies the obligation to be his debt, or in any action of treſpaſſe grown for taking away goods, the defendant denieth that he took them, or in action of the Caſe for ſlanderous words, the defendant denieth that he ſpake them, &c.

4. Commiſſion is to take Niſi prius, & this is directed to two Judges and the Clerke of the Aſſize.
Niſi Prius.

Then the Plaintiffe is to maintaine and prove that the obligation is the Defendants deed, that hee either took the goods, or ſpake the words; upon which deniall and affirmation the Law ſaith, that iſſue is joyned betwixt them, which iſſue of the fact is to be tried by a Jury of twelve men of the County where it is ſuppoſed by the Plaintiffe to be done, and for that purpoſe the

Judges of the Court do award a Writ of *Venire facias* in the Kings name to the Sheriffe of that County, commanding him to cause foure and twenty discreet Free-holders of his County at a certaine day to try this issue so joyned, out of which foure and twenty, onely twelve are chosen to serve. And that double number is returned, because some may make default, and some be challenged upon Kindred, Alliance, or partiall dealing.

These foure and twenty the Sheriffe doth name and certifie to the Court, and withall that hee hath warned them to come at the day according to their Writ. But because at his first summons there falleth no punishment upon the foure and twenty if they come not, they very seldome or never appeare upon the first Writ; and upon their default there is another Writ * returned to the Sheriffe, commanding him to distraine them by their Lands to appeare at a certaine day appointed by the Writ, which is the next terme after, *Nisi Prius Justiciarii nostri ad Assisas capiendas venerint, &c.* of which words the Writ is called a *Nisi prius*, & the Judges of the Circuit of that County in that vacation and mean time before the day of appearance appointed for the Jury above, here by their Commission of *Nisi Prius*, have authority to take the appearance of the Jury in the County before them, and there to heare the Witnesses and proofs on both sides concerning the issue of fact, and to take the verdict of the Jury, and

* Distringas.

The manner of proceeding of Justices of Circuits in their Circuits. The course the Judges hold in their Circuits in the execution of their Commission concerning the taking of Nisi Prius.

against

against the day they should have appeared above, to returne the verdict read in the Court above, which return is called a *Postea*.

Postea.

And upon this verdict cleering the matter in fact, one way or other, the Judges above give judgement for the party for whom the verdict is found, and for such damages and costs as the Jury do assesse.

By those trials called *Nisi Prius*, the Juries and the parties are eased much of the charge they should be put to, by comming to London with their evidences and witnesses; and the Courts of Westminster are eased of much trouble they should have, if all the Juries for trialls should appeare and try their causes in those Courts; for those Courts above have little leisure now: though the Juries come not up, yet in matters of great weight or where the title is intricate or difficult, the Judges above, upon information to them, do retain those causes to be tried there, and the Juries doe at this day in such causes come to the Barre at *Westminster*.

The fifth Commission that the Judges in their Circuits doe sit by, is the Commission of the Peace in every County of their Circuit. And all the Justices of the Peace, having no lawfull impediment, are bound to be present at the Assizes to attend the Judges, as occasion shall fall out: if any make default, the Judges may set a fine upon him at their pleasure and discretions. Also the Sheriffe in every Shire through the Circuit, is to attend in person, or by a sufficient Deputy

5. Commission is a Commission of the Peace.

The Justices of the Peace and the Sheriffe are to attend the Judges in their County.

allowed by the Judges, all that time they be within the County, and the Judges may fine him if he faile, or for negligence or misbehaviour in his Office before them; and the Judges above may also fine the Sheriffe for not returning or not sufficient returning of Writs before them.

Property

Property in Lands, is gotten and transferred by one to another, by these foure manner of wayes.

1 By Entry.
2 By Discent.
3 By Escheat.
4 Most usually by Conveyance.

1 PRoperty by Entry is, where a man findeth a piece of Land that no other possesseth or hath title unto, and he that so findeth it doth enter, this Entry gaineth a Property; this Law seemeth to be derived from this text, *Terra dedit filiis hominum*; which is to be understood, to those that will till and manure it, and so make it yield fruit: and that is hee that entreth into it, where no man had it before. But this manner of gaining Lands was in the first dayes, and is not now of use in England, for that by the conquest, all the Land of this Nation was in the Conquerours hands, and appropriated unto him; except Religious and Church-lands, and the lands in Kent, which by composition were left to the former owners, as the Conquerour found them, so that no man but the Bishopricks, Churches, and the men of Kent, can at this day make any greater title then from the Conquest to any Lands in England; and Lands possessed without any such title, are in the Crowne, and not in him that first entreth; as it is by land left by the Sea, this land belongeth to the

Of the property of Lands to be gained by Entry

All lands in England were the Conquerours and appropriated to him upon the conquest of England, and held of him, except 1. Religious & Church land. 2. the lands of the men of Kent.

Land left by the Sea belongeth to the King.

King, and not to him that hath the lands next adjoyning, which was the ancient Sea bankes; This is to be understood of the inheritance of Lands: *viz.* that the inheritance cannot be gained by the first entry. But an estate for another mans life by out Lawes, may at this day be gotten by entry. As a man called *A.* having Land conveyed unto him for the life of *B.* dieth without making any estate of it; there, whosoever first entreth into the land after the decease of *A.* getteth the property in the land for time of the continuance of the estate which was granted to *A.* for the life of *B.* which *B.* yet liveth, and therefore the said Land cannot revert till *B* die. And to the heire of *A.* it cannot goe, for that it is not any state of inheritance, but onely an estate for another mans life; which is not descendable to the heire, except hee be specially named in the grant: viz. to him and his heirs. As for the Executors of *A.* they cannot have it, for it is not an estate testamentory, that it should goe to the Executors as goods and Chattels should, so as in truth no man can entitle himselfe unto those Lands; and therefore the Law preferreth him that first entreth, and he is called *Occupans*, and shall hold it during the life of *B.* but must pay the rent, performe the conditions, and doe no waste. And hee may by deed assigne it to whom hee please in his life time. But if hee die before hee assigne it over, then it shall go again to whomsoever first entreth and holdeth; and so all the life of *B.* so often as it shall happen.

Occupancy.

Like-

Likewiſe if any man doth wrongfully enter into another mans poſſeſsion, and put the right owner of the Freehold and Inheritance from it, he thereby getteth the Freehold and Inheritance by diſſeiſin, and may hold it againſt all men, but him that hath right, and his heires, and is called a diſſeiſor. Or if any one die ſeiſed of lands, and before his heire doth enter, one that hath no right doth enter into the lands, and holdeth them from the right heire, hee is called an Abator, and is lawfull owner againſt all men but the right heire.

And if ſuch perſon Abator, or Diſſeiſor (ſo as the Diſſeiſor hath quiet poſſeſſion five yeares next after the Diſſeiſin) doe continue their poſſeſſion, and die ſeiſed, and the land diſcend to his heire, they have gained the right to the poſſeſſion of the land againſt him that hath right, till hee recover it by fit action reall at the common law. And if it be not ſued for at the common law within threeſcore yeeres after the diſſeiſin, or abatement committed, the right Owner hath loſt his right by that negligence. And if a man hath divers children, and the elder being a Baſtard doth enter into the land, and enjoyeth it quietly during his life, and dieth thereof ſo ſeiſed, his heires ſhall hold the land againſt all the lawfull children and their iſſues.

Property of lands by diſcent is, where a man hath lands of inheritance and dieth, not diſpoſing of them, but leaving it to goe (as the Law caſteth it) upon the heire. This is called a diſcent

Property of lands by diſcent.

of

of law, and upon whom the diſcent is to light, is the queſtion. For which purpoſe the law of inheritance preferreth the firſt childe before all others, and amongſt children the male before the female; and amongſt males the firſt borne. If there be no children, then the brother, if no brothers, then ſiſters, if neither brothers nor ſiſters, then unkles, and for lack of unkles, aunts, if none of them, then couzens in the neereſt degree of conſanguinity, with theſe three rules of diverſities. 1. That the eldeſt male ſhall ſolely inherit; but if it come to females, then they being all in an equall degree of neerneſſe ſhal inherit all together, and are called Parceners, and all they make but one heire to the Anceſtor. 2 That no brother nor ſiſter of the halfe bloud ſhall inherit to his brother or ſiſter, but as a childe to his parents: as for example, If a man have two wives, and by either wife a ſonne, the eldeſt ſonne overliving his Father is to be preferred to the inheritance of the Father being Fee-ſimple; but if he entreth and dyeth without a childe, the brother ſhall not be his heire, becauſe hee is of the halfe bloud to him, but the unkle of the eldeſt brother or ſiſter of the whole bloud: yet if the eldeſt brother had died or had not entred in the life of the Father, either by ſuch entry or conveyance, then the youngeſt brother ſhould inherit the land that the Father had, although it were a childe by the ſecond wife, before any daughter by the firſt. The third rule about diſcents. That Land purchaſed ſo by the party himſelfe that dieth, is to be in-

Of diſcent three rules.

Brother or ſiſter of the halfe bloud ſhall not inherit to his brother or ſiſter, but only as a childe to his Parents.

inherited; first, by the heires of the Fathers side, then if he have none of that part, by the heires of the Mothers side. But lands descended to him from his Father or Mother, are to go to that side onely from which they came, & not to the other side. Discent.

Those Rules of Descent mentioned before are to be understood of Fee-simples, and not of entailed Lands, and those Rules are restrained by some particular customes of some particular places: as namely, the customes of *Kent*, that every Male of equall degree of Child-hood, Brotherhood or Kindred, shall inherit equally (as daughters shall being Parceners) and in many Borough Townes of England the custome alloweth the youngest sonne to inherit, and so the youngest Daughter. The custome of *Kent*, is called *Gavelkind*. The custome of Boroughs, *Burgh English*. Customes of certain places.

And there is another note to be observed in Fee-simple Inheritance, and that is, that every heire having Fee-simple Land or Inheritance, be it by common Law or by custome of either Gavelkinde or *Burgh English*, is chargeable so farre forth as the value thereof extendeth with the binding acts of the Ancestors from whom the Inheritance descendeth; and these Acts are collaterall encombrances, and the reason of this charge is, *Qui sentit commodum, sentire debet & incommodum sive onus*. As for example, if a man binde himselfe and his heires in an obligation, or doe covenant by writing for him and his heires, or Every heire having land is bound by the binding Acts of his Ancestors if hee be named.

do grant an Annuity for him and his heires; or doe make a Warranty of Land, binding him and his heires to Warranty: in all these cases the Law chargeth the Heire after the death of the Ancestor with this Obligation, Covenant, Annuity, and Warranty; yet with these three cautions: first, that the party must by speciall name binde himselfe and his heires, or covenant, grant and warrant for himselfe and his heires; otherwise the heire is not to be touched. Secondly, that some action must be brought against the heire whilest the Land or other Inheritance resteth in him unaliened away: for if the Ancestour die, and the heire, before an Action be brought against him upon those bonds, covenants, or warranties, doe alien away the Land, then the heire is cleane discharged of the burthen, except the Land was by fraud conveyed away of purpose to prevent the suit intended against him. Thirdly, that no heire is further to be charged then the value of the Land descended unto him from the same Ancestor that made the instrument of charge, and that Land also, not to be sold out-right for the debt, but to be kept in extent, and at a yearly value, untill the debt or damage be run out. Nevertheless if an heire that is sued upon such a debt of his Ancestour doe not deale clearly with the Court when hee is sued, that is, if hee come not in immediately, and by way of confession set downe the true quantity of his Inheritance descended, and so submit himselfe therefore, as the Law requireth, then that heire that otherwise demeaneth

Dyer 114. Plowd.

Dyer 149. Plowd.

Day & Pepps case.

eth himselfe, shall be charged of his owne Lands or goods, and of his money, for this Deed of his Ancestor. As for example; If a man binde himselfe and his heires in an Obligation of one hundred pounds, and dieth leaving but ten Acres of Land to his heire, if his heire be sued upon the bond, and commeth in, and denyeth that hee hath any Lands by discent, and it is found against him by the verdict that hee hath ten Acres, this heire shall be now charged by his false plea of his own Lands, goods and body, to pay the hundred pound, although the ten Acres be not worth ten pound.

Heire charged for his false plea.

Property of Lands by Escheat, is where the Owner died seised of the Lands in possession without childe or other heire, thereby the Land for lacke of other heire is said to escheate to the Lord of whom it is holden. This lacke of heire happeneth principally in two cases; First, where the Lands Owner is a Bastard. Secondly, where he is attainted of Felony or Treason. For neither can a Bastard have any heire except it be his owne childe, nor a man attainted of Treason, although it be his own childe.

Property of lands by Escheat.

Two causes of Escheat.
1. Bastardy.
2. Attainder of Treason, Felony.

Upon attainder of Treason the King is to have the Land, although he be not the Lord of whom it is held, because it is a royall Escheat. But for Felony it is not so, for there the King is not to have the Escheat, except the Land be holden of him: and yet where the Land is not holden of him, the King is to have the Land for a yeare and a day next ensuing the judgement of the Attainder

Attainder of treason entitleth the King, though lands be not holden of him, otherwise in attainder of felony, &c. for there the King shall have but *Annum diem & vastum.*

In Escheat two things are to be observed. 1. The tenure. 2. The manner of the Attainder.

All lands are holden of the Crown immediately or mediately by Mesne Lords, the Reason.

Coucerning the tenure of Lands.

The Conquerour by right of Conquest got all the lands of the Realme into his hands, and as hee gave it, he still reserved rents and services.

Knights service in *Capite* first instituted.

The reservations in Knights service tenure was foure;

1. Marriage of the Wards Male and Female.

2. Horse for service.

3. Homage and Fealty.

4. Primer Seisin.

The policie of the Conq. in the reservation of services constituted in 4. particulars, was to have the Marriage of his Wards both Male and Female.

der, with a liberty to commit all manner of wast all that yeare in Houses, Gardens, Ponds, Lands, and Woods.

In these Escheats two things are especially to be observed; the one is, the tenure of the Lands, because it directeth the person to whom the Escheat belongeth, *viz.* the Lord of the Mannor of whom the Land is holden. 2. The manner of such attainder which draweth with it the Escheat. Concerning the Tenures of Lands, it is to be understood, that all Lands are holden of the Crown either mediately, or immediately, and that the Escheat appertaineth to the immediate Lord, and not to the mediate. The reason why all Land is holden of the Crown immediately, or by Mesne Lords, is this.

The Conquerour got by right of Conquest all the Land of the Realme into his owne hands in Demeasne, taking from every man all estate, tenure, property and liberty of the same, (except Religious and Church-Lands, and the Land in *Kent*) and still as hee gave any of it out of his own hand, he reserved some retribution of Rents, or Services, or both, to him and to his heires; which reservation is that which is called the tenure of Land.

In which reservation he had foure institutions, exceeding politique and sutable to the state of a Conquerour.

1. Seeing his people to be part *Normans*, and part *Saxons*, the *Normans* hee brought with him, the *Saxons* hee found here; hee bent himselfe to con-

conjoyn them by Marriages in amity, and for that purpose ordains, that if those of his Nobles, Knights, and Gentlemen, to whom he gave great rewards of Lands should die, leaving their heire within age, a Male within 21. and a Female within fourteene years, and unmarried, then the King should have the bestowing of such heires in marriage, in such a family, and to such persons as he should think meet: which interest of marriage went still imployed, and doth at this day in every tenure called Knights Service.

Interest of Marriage goeth imployed in every tenure by Knights service.

The second was, to the end that his people should still be conserved in warlike exercises and able for his defence. When therfore he gave any good portion of Lands, that might make the party of abilities or strength, hee withall reserved this service, That that party and his heires having such Lands, should keepe a horse of service continually, and serve upon him himselfe when the King went to wars; or else having impediment to excuse his owne person, should finde another to serve in his place: which service of horse and man, is a part of that tenure called Knights Service at this day.

Reservation that his tenant should keepe a horse of Service, and serve upon him himselfe, when the King went to wars, which is a part of that Service called Knights Service.

But if the tenant himselfe bee an Infant, the King is to hold this Land himselfe untill he come to full age, finding him meate, drinke, apparell, and other necessaries, and finding a horse and a man with the overplus, to serve in the warres as the tenant himselfe should doe if hee were at full age.

But if this Inheritance descend upon a woman that cannot serve by her sex, then the King is not to have the lands, she being of 14. of years of age, because she is then able to have an husband that may doe the service in person.

3. Institution of the Conquerour was, that his tenants by Knights service vow unto loyalty, which he called Homage, and make unto him oath of his faith which was called Fealty.
1. Homage.
2. Fealty.

The third Institution, that upon every gift of Land the King reserved a vow & an oath to binde the party to his faith and loyalty, that vow was called *Homage*, the oath *Fealty*. Homage is to be done kneeling, holding his hands between the knees of the Lord, saying in the French tongue; I become your man of life and limbe, and of earthly honour. Fealty is to take an oath upon a book, that he wil be a faithful Tenant to the King, and doe his service, and pay his rents according to his tenure.

Ayde money to make the Kings eldest Son a Knight, or to marry his eldest Daughter, is likewise due to his Majesty from every one of his Tenants in Knights Service, that hold by a whole fee 20. s. and from every Tenant in Soccage if his land be worth 20 pound *per ann.* 20 s. *vide* N. 3. fol. 82.

4. Institution was for Recognizon of the Kings bounty, to be paid by every heire upon the death of his ancester, which is one yeares profit of the lands called *Primer seisin*.

The fourth Institution was, that for Regognizon of the Kings bounty by every heire succeeding his Ancestor in those Knights Service Lands, the King should have *Primer seisin* of the lands, which is one yeares profit of the lands, and untill this be paid the King is to have possession of the land, and then to restore it to the heir; which

Escuage was likewise due unto the King from his tenant by Knights service: when his Majesty made a voyage royall to warre against another Nation, those of his tenants that did not attend him there for 40. dayes with horse and furniture fit for service, were to be assessed in a certaine summe by act of Parliament, to be paid unto his Majesty; which assessement is called Escuage.

con-

continueth at this day in uſe, and is the very cauſe of ſuing Livery, and that as well where the heire hath been in Ward as otherwiſe.

Theſe before mentioned be the rights of the Tenure, called Knights Service in *Capite*, which is as much to ſay, as tenure *de perſona Regis*, and *Caput* being the chiefeſt part of the perſon, it is called a tenure in *Capite*, or in chiefe. And it is alſo to bee noted, that as this Tenure in *Capite* by Knights Service generally was a great ſafety to the Crowne, ſo alſo the Conquerour inſtituted other Tenures in Capite neceſſary to his eſtate; as namely, he gave divers Lands to be holden of him by ſome ſpeciall ſervice about his perſon, or by bearing ſome ſpeciall office in his houſe, or in the field, which have Knights Service and more in them, and theſe hee called Tenures by *Grand Serjeanty*. Alſo he provided upon the firſt gift of Lands, to have revenewes by continuall ſervice of Ploughing his Land, repairing his Houſes, Parkes, Pales, Caſtles, and the like. And ſometimes to a yeerly proviſion of Gloves, Spurres, Hawkes, Horſes, Hounds, and the like; which kinde of reſervations are called alſo Tenures in chiefe or in Capite of the King, but they are not by Knights Service, becauſe they required no perſonall Service, but ſuch things as the tenants may hire another to doe, or provide for his money. And this Tenure is called a tenure by Soccage in Capite, the word *Socagium* ſignifying the Plough, howbeit in this latter time, the ſervice of Ploughing the Land is turned into Money Rent, and ſo of harveſt

Knights ſervice in Capite is a tenure *de perſona Regis*.

Tenants by grand Serjeanty were to pay reliefe at the full age of every heire, which was one yeares value of the lands ſo held, *ultra Repriſſ.*

Grand ſerjeanty.
Petty ſerjeanty.

The inſtitution of ſoccage in Capite, and that it is now turned into monies rents.

harveſt works, for that the Kings do not keep their Demeaſne in their owne hands as they were wont to doe, yet what lands were *De antiquo Dominio Corone*, it well appeareth in the Records of the Exchequer called the book of Doomeſday. And the Tenants by ancient Demeaſne, have many immunities and priviledges at this day, that in ancient times were granted unto thoſe Tenants by the Crown, the particulars wherof are too long to ſet down.

Theſe tenures in *Capite*, as well that by *Soccage*, as the others by *Knights Service*, have this Property; that the Tenants cannot alien their lands without licence of the King: if they do, the King is to have a Fine for the contempt, and may ſeize the Land, and retain it untill the fine be paid. And the reaſon is, becauſe the King would have a liberty in the choice of his Tenant, ſo that no man ſhould preſume to enter into thoſe lands, and hold them (for which the King was to have thoſe ſpeciall ſervices done him) without the Kings leave; This licence and fine as it is now digeſted is eaſie and of courſe.

Office of alienation.

There is an office called the office of *Alienation*, where any man may have a Licence at a reaſonable rate, that is, at the third part of one yeares value of the Land moderately rated. A Tenant in *Cap.* by Knights Service or grand Serjeanty, was reſtrained by ancient Statute, that hee ſhould not give nor alien away more of his Lands, then that with the reſt he might be able to do the ſervice due to the King; and this is now out of uſe.

A licence of alienation is the third part of one years value of the land moderately rated.

And

And to this tenure by Knights ſervice in chief, was incident that the King ſhould have a certaine ſumme of money, called *Aid*; due to be ratably levied amongſt all thoſe Tenants proportionably to his lands, to make his eldeſt ſonne a Knight, or to marry his eldeſt Daughter.

Aid a ſumme of money ratably levied according to the proportion of the lands.

Every Tenant by Knights Service in Capite, had to make the Kings eldeſt Sonne a Knight, or to marry his eldeſt Daughter.

And it is to be noted, that all thoſe that hold lands by the tenure of Soccage in *Capite* (although not by Knights Service) cannot alien without licence, and they are to ſue livery, and pay Primer ſeiſin, but not to be in Ward for body or land.

Tenants by Soccage in Cap. muſt ſue livery and pay Primer ſeiſin, and not to be in Ward for body or land.

By example and reſemblance of the Kings policy in theſe inſtitutions of Tenures, the Great men and Gentlemen of this Realme did the like ſo neere as they could; as for example, when the King had given to any of them two thouſand Acres of land, this party purpoſing in this place to make his dwelling, or (as the old word is) his Manſion houſe, or his Mannor houſe; did deviſe how hee might make his land a compleat habitation to ſupply him with all manner of neceſſaries, and for that purpoſe, hee would give of the uttermoſt parts of thoſe two thouſand Acres, 100. or 200. Acres, or more or leſſe, as he ſhould think meet, to one of his moſt truſty ſervants, with ſome reſervation of rent to finde a horſe for the Warres, and and goe with him when he went with the King to the Warres, adding vow of Homage, and the Oath of Fealty, Wardſhip, Marriage, & relief. This reliefe is to pay five pound for every

How Mannors were at firſt created.

Mannors created by great men in imitation of the policy of the King in the inſtitutions of tenures *A manere*, the word Mannor.

Knights Service tenure reſerved to common perſons.

Knights Service tenure created by the Lord is not a tenure by Knights Service of the perſon of the Lord, but of his Mannor.

Reliefe is five pound to be paid by every Tenant by knights ſervice to his Lord upon his entrance reſpectively for every Knights Fee deſcended.

Knights Fee, or after the rate for more or leſſe at the entrance of every heire; which tenant ſo created and placed, was & is to this day called a tenant by Knights Service, and not by his owne perſon, but of his Mannors; of theſe hee might make as many as he would. Then this Lord would provide that the land which he was to keepe for his owne uſe, ſhould be ploughed, and his harveſt brought home, his houſe repaired, his Parke pailed, and the like: and for that end he would give ſome leſſer parcels to ſundry others, of twenty, thirty, forty or fifty Acres; reſerving the ſervice of ploughing a certaine quantity, or ſo many dayes, of his land, and certaine harveſt workes or dayes in the harveſt to labour, or to repaire the Houſe, Parke pale, or otherwiſe, or to give him for his proviſion Capons, Hens, Pepper, Commin, Roſes, Gilliflowers, Spurres, Gloves, or the like; or to pay him a certaine rent, and to bee ſworne to be his faithfull tenant, which tenure was called a ſoccage tenure, and is ſo to this day, howbeit moſt of the ploughing and harveſt ſervivices are turned into money rents.

Soccage tenure reſerved by the Lord.

The Tenants in Soccage at the death of every Tenant were to pay Reliefe, which was not as Knights Service is, five pound a Knights fee. But it was, and ſo is ſtill, one yeares rent of the land; and no Wardſhip or other profit to the Lord. The remainder of the two thouſand Acres he kept to himſelf, which he uſed to manure by his bondmen, and appointed them

Reliefe of tenant in Soccage, one years rent and no wardſhip or other profit upon the dying of the Tenant.

Aid mony & Eſcuage money is likewiſe due unto the Lords of their Tenants, *vide* N. 3. fol. 82. & 83.

them at the Courts of his Manor how they ſhould hold it, making an entry of it into the Roll of the Remembrances of the Acts of his Court, yet ſtill in the Lords power to take it away: and therfore they were called tenants at will, by Coppy of Court Roll; being in truth bondmen at the beginning: but having obtained freedome of their perſons, and gained a cuſtome by uſe of occupying their Lands, they now are called Coppy-holders, and are ſo priviledged, that the Lord cannot put them out, and all through Cuſtome. Some Coppy holders are for lives, one, two, or three ſucceſſively; and ſome inheritances from heire to heire by cuſtome, and cuſtome ruleth theſe eſtates wholly, both for widdowes eſtates, fines, harriots, forfeitures, and all other things.

Villenage or Tenure by Coppy of Court Roll.

Mannors being in this ſort made at the firſt, reaſon was that the Lord of the Mannor ſhould hold a Court, which is no more then to aſſemble his Tenants together, at a time by him to be appointed; in which Court hee was to be informed, by oath of his Tenants, of all ſuch Duties, Rents, Reliefes, Wardſhips, Coppy-holds or the like, that had hapned unto him; which information is called a preſentment, and then his Bailiffe to ſeize and diſtraine for thoſe duties if they were denied or with-holden, which is called a Court Baron: and herein a man may ſue for any debt or treſpaſſe under forty pound value, and the Freeholders are to judge of the cauſe upon proofe produced upon both ſides. And therefore the Free-holders of theſe Mannors, as incident to their Tenures,

Court Baron, with the uſe of it.

Suit to the Court of the Lord incident to the tenure of the free-holders.

doe hold by fuit of Court, which is to come to the Court, and there to judge between party and party in thoſe petty actions; and alſo to informe the Lord of duties, rents, and ſervices unpaid to him from his tenants. By this courſe it is diſcerned who be the Lords of Lands, ſuch as if the Tenants die without heire, or be attainted of felony or treaſon, ſhall have the land by Eſcheat.

What Attainders ſhall give the Eſcheat to the Lord. Attainders, 1. By judgement, 2. By verdict or confeſſion, 3. By outlawry, give the lands to the Lord

Now concerning what Attainders ſhall give the Eſcheat to the land, it is to be noted, that it muſt either bee by judgement of death given in ſome Court of Record againſt the Felon found guilty by Verdict, or confeſſion of the Felony, or it muſt be by out-lawry of him.

Of an Attainder by Out-lawry.

The Out-lawry groweth in this ſort; a man is indicted for felony, being not in hold, ſo as hee cannot bee brought in perſon to appeare and to bee tryed, inſomuch that Proceſſe of *Capias* is therefore awarded to the Sheriffe, who not finding him, returneth, *Non eſt inventus in Balliva mea*; and thereupon another *Capias* is awarded to the Sheriffe, who likewiſe not finding him maketh the ſame returne; then a Writ called an *Exigent* is directed to the Sheriffe, commanding him to Proclaime him in his County Court five ſeverall Court dayes to yield his body, which if the Sheriffe doe, and the party yield not his body, hee is ſaid by the default, to be Out-lawed, the Coroners there adjudging him Out-lawed, and the Sheriffe making the returne of the Proclamations and of the judgement of the Coroners upon the backe ſide of the Writ. This is an Attainder

of

of Felony, wherupon the offender doth forfeit his lands by an Eſcheat to the Lord of whom they are holden.

But note, that a man found guilty of Felony by verdict or confeſſion, and praying his Clergy, and thereupon reading as a Clerke, and ſo burnt in the hand and diſcharged, is not attainted, becauſe hee by his Clergy preventeth the judgement of death, and is called a Clerk convict, who loſeth not his Lands, but all his goods, Chattels, Leaſes, and Debts. Prayer of Clergy

So a man indicted that will not anſwer nor put himſelfe upon triall, although hee be by this to have judgement of Preſſing to death, yet hee doth forfeit no Lands, but Goods, Chattels, Leaſes, and Debts, except his offence be treaſon, and then hee forfeiteth his lands to the Crown. Hee that ſtandeth mute forfeiteth no lands, except for Treaſon.

So a man that killeth himſelfe ſhall not loſe his lands, but his Goods, Chattels, Leaſes, and Debts. So of thoſe that kill others in their owne defence, or by miſ-fortune. Hee that killeth himſelf forfeiteth but his Chattels.

A man that being purſued for Felony, and flyeth for it, loſeth his goods for his flying, although he returne and is tried, and found not guilty of the Fact. Flying for felony a forfeiture of goods.

So a man indicted of Felony, if hee yield not his body to the Sheriffe untill after the Exigent of Proclamation is awarded againſt him, this man doth forfeit all his goods for his long ſtay, although hee be found not guilty of the Felony; but none is attainted to loſe his Lands, but onely ſuch as have Judgements of death by triall upon Hee that yielderh his body upon the Exigent for Felony forfeiteth his goods.

verdict or their owne confeſſion, or that they be by Judgement of the Coroners Out-lawed as before.

Lands entailed Eſcheat to the King for treaſon.

Beſides the Eſcheats of Lands to the Lords of whom they be holden for lacke of Heires, and by Attainder for Felony (which onely doe hold place in Fee-ſimple Lands) there are alſo forfeiture of Lands to the Crowne by Attainder of Treaſon; as namely, if one that hath entailed Lands commit Treaſon, hee forfeiteth the profits of the Lands for his life to the Crowne, but not to the Lord.

Stat 26.H.8.

Tenant for life committeth treaſon or felony, there ſhall be no Eſcheat to the Lo.

And if a man having an eſtate for life of himſelf or of another, commit Treaſon or Felony, the whole Eſtate is forfeited to the Crowne, but no Eſcheat to the Lord.

But a Coppy-hold, for Fee-ſimple, or for life, is forfeited to the Lord and not to the Crowne; and if it be entailed, the Lord is to have it during the life of the offender onely, and then his heire is to have it.

The Cuſtome of *Kent* is, that Gavelkind land is not forfeitable nor Eſcheatable for Felony, for they have an old ſaying; The Father to the Bough, and the Sonne to the Plough.

The wife loſeth no power notwithſtanding the husband be attainted of felony.

If the Husband was attainted, the Wife was to loſe her thirds in caſes of Felony and Treaſon, but yet ſhee is no offender; but at this day it is holden by Statute Law that ſhee loſeth them not for the husbands Felony. The relation of theſe forfeits are theſe.

1. That

1. That men attainted of Felony or Treason by verdict or confeſſion, doe forfeit all the lands they had at the time of their offence committed, and the King or the Lord, whoſoever of them hath the Eſcheate or forfeiture, ſhall come in and avoid all Leaſes, Statutes, or conveyances done by the offender, at any time ſince the offence done. And ſo is the Law cleere alſo if a man be attained for Treaſon by Out-lawry; but upon Attainder of Felony by Out-lawry, it hath beene much doubted by the Law Bookes whether the Lords title by Eſcheat ſhall relate backe to the time of the offence done, or onely to the date or teſte of the Writ of Exigent for Proclamation, whereupon hee is outlawed; howbeit at this day it is ruled, that it ſhall reach back to the time of his fact; but for goods, chattels, and debts, the Kings title ſhall looke no further backe then to thoſe goods, the party attainted by verdict or confeſſion, had at the time of the verdict and confeſſion, given or made, and in Out-lawries at the time of the Exigent as well in Treaſons as Felonies: wherein it is to be obſerved, that upon the parties firſt apprehenſion, the Kings Officers are to ſeize all the goods and Chattels, and preſerve them together, diſpending onely ſo much out of them as is fit for the ſuſtentation of the perſon in priſon, without any waſting, or diſpoſing them untill conviction, and then the property of them is in the Crown, and not before.

Of the relation of Attainders, as to the forfeiture of lands and goods with the diverſity.

Attainder in felony or treaſon by verdict, confeſſion or out-lawry, forfeiteth all they had from the time of the offence committed

And ſo it is upon an attainder of out-lawry, otherwiſe it is in the attainder by verdict, confeſſion, and outlawry, as to their relation for the forfeiture of goods and Chattels.

The Kings officers upon the apprehenſion of a Felon are to ſeize his goods and Chattels.

It

A person attainted may purchase, but it shall be to the Kings use. There can be no restitution in bloud without act of Parliament, but a pardon enableth a man to purchase, and the heire begotten after shall inherit those Lands.

It is also to be noted, that persons attained to Felony or Treason, have no capacity in them to take, obtaine or purchase, save onely to the use of the King, untill the party be pardoned. Yet the party giveth not back his lands or goods without a speciall Patent of Restitution, which cannot restore the bloud without an Act of Parliament. So if a man have a Sonne, and then is attainted of Felony or Treason and pardoned, and purchaseth lands, and then hath issue another Son, and dieth; the Son he had before he had his pardon, although he be his eldest Sonne, and the Patent have the words of restitution to his lands, shall not inherit, but his second Son shall inherit them, and not the first; because the bloud is corrupted by the Attainder, and cannot be restored by Patent alone, but by Act of Parliament. And if a man have two Sonnes, and the eldest is attainted in the life of his Father, and dieth without issue, the Father living, the second Son shall inherit the fathers lands; but if the eldest Son have any issue, though he die in the life of his Father, then neither the second Son, nor the issue of the eldest, shall inherit the Fathers lands, but the Father shall there be accompted to die without heire, and the land shall Escheat, whether the eldest Son have issue or not afterward or before, though hee be pardoned after the death of his Father.

Propertie of Lands by Conveyance, is first distributed into Estates, for yeares, for life, in Taile, and Fee-simple.

Property of land by conveyance divided into,
1. Estates in Fees.
2. In Tayle.
3. For Life.
4. For Yeares.

THese Estates are created by word, by writing, or by record. For Estates of yeares, which are commonly called Leases for yeares, they are thus made; where the Owner of the Land agreeth with the other by word of mouth, that the other shall have, hold, and enjoy the Land, to take the profits thereof for a time certain of yeares, moneths, weeks or dayes, agreed between them; and this is called a Lease Paroll; such a Lease may be made by writing Pole, or indented of devise, grant and to farme let, and so also by fine of Record, but whether any Rent be reserved or no, it is not materiall. Unto these leases there may be annexed such Exceptions, Conditions, and Covenants, as the parties can agree on. They are called Chattels Reall, and are not inheritable by the heires, but goe to the Executors, and Administrators, and be saleable for debts in the life of the Owner, or in the Executors or Administrators hands by Writs of Execution upon Statutes, Recognizances, Judgements of debts or damages. They be also

Lease Paroll.

Lease by writing Pole or indented.

A rent need not to be reserved.

Leases for yeares they goe to the Executors and not to the heires.

Leaſes are to be forfeited by attainder.
1. In Treaſon.
2. Felony. 3. Premunire. 4. By killing himſelfe.
5. For flying.
6. Standing out, or mute, or refuſing to be tryed by the Country.
7. By conviction.
8. Petty larceny,
9. Going beyond the Sea without licence.

forfeitable to the Crowne by Outlawry, by Attainder for Treaſon, Felony, or Premunire, killing himſelf, flying for Felony, although not guilty of the fact, ſtanding out or refuſing to be tried by the County, by conviction of Felony, by verdict without Judgement, Petty larceny, or going beyond the Sea without licence.

By what meanes they are forfeitable.

Extents upon Stat. Staple, Merchant, or Elegit.

They are forfeitable to the Crowne, in like manner as Leaſes for yeares, or intereſt gotten in other mens Lands, by extending for debt upon Judgement in any Court of Record, Stat. Merchant Stat. Staple, Recognizances; which being upon Statutes are called Tenants by Stat. Merchant, or Staple, the other Tenants by Elegit, and by Wardſhip of body and lands: for all theſe are called Chattels reall, and go to the Executors and Adminiſtrators, and not to the heires, and are ſaleable and forfeitable as Leaſes for yeares are.

Wardſhip of body and lands are Chattels, and forfeitable in the ſame manner as Leaſes for yeares are.

Leaſes for lives are alſo called Freeholds: they may alſo be made by Word or Writing. There muſt be Livery and Seiſin given at the making of the Leaſe by him, whom wee call the Leſſor; who commeth to the doore, backſide or garden, if it be a houſe, if not, then to ſome part of the land, & there he expreſſeth, that he doth grant unto the taker called the Leſſee for tearme of his life: and in Seiſin thereof, he delivereth to him a Turfe, Twig, or Ring of the doore: and

What Livery of Seiſin is, and how it is requiſite to every Eſtate for life.

Indorſement of Livery upon the backe of the deed, and witneſſe of it.

Leaſe for life is not forfeitable by Outlawry except in caſes of Felony or Premunire, & then to the King and not to the Lord by Eſcheat; and it is not forfeited by any of the means before mentioned about Leaſes for yeares.

if

if the Leaſe be by writing, then commonly there is a note written on the backſide of the Leaſe, with the names of thoſe witneſſes who were preſent at the time of the Livery of Seiſin made. This eſtate is not ſaleable by the Sheriffe for debt, but the land is to be extended for a yearly value, to ſatiſfie the debt. It is not forfeitable by Outlawry, except in caſes of Felony, nor by any of the meanes before mentioned, of Leaſes for yeares; ſaving in an Attainder for Felony, Treaſon, Premunire, and then onely to the Crown, and not to the Lords by Eſcheat.

Leaſe for life not to be ſold by the Sheriffe for debt, but extended yearly.

And though a Noble man or other have liberty by Charter, to have all Felons goods; yet a Tenant holding for tearme of life, being attainted of Felony, doth forfeit unto the King and not to this Nobleman.

A man that hath bona Felon. by Charter, ſhall not have the Eſtate if leaſer for life be attainted.

If a man have an Eſtate in lands for another mans life, and dieth; this land cannot goe to his heire, nor to his Executors, but to the party that firſt entreth; and hee is called an Occupant, as before hath been declared.

Occupant.

A Leaſe for yeares or for life may be made alſo by fine of Record, or bargaine and ſale, or covenant to ſtand ſeized upon good conſiderations of marriage, or bloud; the reaſons whereof are hereafter expreſſed.

Of eſtate tailes, and how ſuch an eſtate may be limited.

Entailes of Lands are created by a gift, with Livery and Seiſin to a man, and to the heires of his body; This word (body) making the entaile, may be demonſtrated and reſtrained to the Males or Females, heires of their two bodies, or

of the body of either of them, or of the body of the grandfather or father.

By the Stat. of Weſt. 1. made in Ed. 1. time, eſtates in tayle were ſo ſtrengthened that they were not forfeitable by any Attainder.

Entails of Lands beganne by a Statute made in *Ed.* 1. time, by which alſo they are ſo much ſtrengthened, as that the Tenant in taile could not put away the land from the heir by any act of conveyance or attainder, nor let it, nor incumber it, longer then his own life.

The great inconvenience that enſued thereof.

But the inconvenience thereof was great, for by that means, the land being ſo ſure tyed upon the heire as that his Father could not put it from him, it made the Sonne to be diſobedient, negligent, and waſtfull; often marrying without the Fathers conſent, and to grow inſolent in vice, knowing, that there could be no check of diſinheriting him. It alſo made the Owners of the land leſſe fearfull to commit Murthers, Felonies, Treaſons, and Man-ſlaughters; for that they knew none of theſe Acts could hurt the heire of his inheritance. It hindred men that had entailed lands, that they could not make the beſt of their lands by fine and improvement, for that none upon ſo uncertain an eſtate as for terme of his own life, would give him a fine of any value, nor lay any great ſtocke upon the land that might yield rent improved.

The Prejudice the Crown received thereby.

Laſtly, thoſe entails did defraud the Crowne, and many ſubjects of their debts; for that the land was not lyable longer then his owne life time; which cauſed that the King could not ſafely commit any office of accompt to ſuch whoſe lands were entailed, nor other men truſt them with loan of money.

These inconveniences were all remedied by Acts of Parliament; as namely by Acts of Parliament later then the Acts of entailes, made 4.*H.*7 32.*H.*8. A Tenant in taile may disinherit his Sonne by a fine with Proclamation, and may by that meanes also make it subject to his Debts and Sales.

The Stat 4.H.7. and 32.H.8. to bar estates taile by fine.

By a Statute made, 26.*H.*8. A Tenant in taile doth forfeit his lands for Treason; and by another Act of Parliament, 32.*H.*8. hee may make Leases good against his heire for one and twenty yeares, or three lives; so that it be not of his chiefe houses, lands, or demeasne, or any lease in reversion, nor lesse rent reserved then the Tenants have payed most part of one and twenty years before, nor have any manner of discharge for doing wastes and spoyles: by a Statute made 33.*H.*8. Tenants of entailed lands are lyable to the Kings Debts by Extent, and by a Statute made 13. and 39.*Eliz.* they are saleable for the arrerages upon his accompt for his Office; So that now it resteth, that entailed lands have two priviledges onely which be these. First, not to be forfeited for Felonies. Secondly, not to be extended for debts after the parties death, except the intailes be cut off by fine and recovery.

26.H.8.

32.H.8.

33.H.8.

13.& 39 Eliz. Entails two priviledges.

1. Not forfeitable for felony.

2. Not extendable for the debts of the party after his death: *Proviso*, not to put away the land from his next heire. It hee doe, to forfeit his own estate, and that his next heir must enter.

But it is to be noted that since these notable Statutes, and remedies provided by Statutes, doe docke entailes, there is start up a device called Perpetuitie, which is an entaile with an addition of a *Proviso* Conditionall, tied to his estate, not to put away the land from his next heire; and if

Of the new device called a Perpetuity, which is an entaile with an addition.

he do, to forfeit his own eſtate. Which Perpetuities if they ſhould ſtand, would bring in all the former inconveniences ſubject to entails, that were cut off by the former mentioned Statutes, and farre greater; for by the Perpetuity, if hee that is in poſſeſſion ſtart away never ſo little, as in making a Leaſe, or ſelling a little quillet, forgetting after two or three diſcents; as often they do how they are tyed, the next heire muſt enter; who peradventure is his Sonne, his Brother, Uncle, or Kinſman: and this raiſeth unkind ſuits, ſetting all that kindred at jars, ſome taking one part, ſome another, and the principall parties waſting their time and money in ſuits of law. So that in the end they are both conſtrained by neceſſity to joyne both in a ſale of the land, or a great part of it, to pay their debts, occaſioned through their ſuits: And if the chiefeſt of the Family for any good purpoſe of well ſeating himſelfe, by ſelling that which lieth farre off is to buy that which is neere, or for the advancement of his Daughters or yonger Sonnes ſhould have reaſonable cauſe to ſell, this Perpetuitie, if it ſhould hold good, reſtraineth him. And more then that, where many are Owners of inheritance of land not entailed, may, during the minority of his eldeſt Sonne, appoint the profits to goe to the advancement of the yonger Sonnes and Daughters, and pay debts; but by entails & perpetuities the owners of theſe lands cannot do it, but they muſt ſuffer the whole to deſcend to the eldeſt Sonne, and ſo to come to the Crowne by Wardſhip all the time of his Infancy.

Theſe Perpetuities would bring in all the former inconveniences of Eſtates tails.

The inconveniences of thoſe Perpetuities.

Where-

Wherefore seeing the dangerous times and untowardly heires, they might prevent those mischiefs of undoing their houses by conveying the land from such heires, if they were not tied to the stake by those Perpetuities, and restrained from forfeiting to the Crowne, and disposing it to their owne or to their childrens good; therefore it is worthy of consideration, whether it be better for the subject and Soveraigne to have the lands secured to mens names and bloods by perpetuities with all the inconveniences above mentioned, or to be in hazard of undoing his house by unthrifty posteritie.

Quære whether it be better to restraine men by these perpetuities from alienations, or to hazard the undoing of houses by unthrifty posterity.

The last and greatest estate of lands is Fee-simple, and beyond this there is none of the former for lives, yeares or entails; but beyond them is Fee-simple. For it is the greatest, last and uttermost degree of estates in land; therefore hee that maketh a lease for life, or a gift in taile, may appoint a remaynder when hee maketh another for life or in taile, or to a third in Fee-simple; but after a Fee-simple hee can limit no other estate. And if a man doe not dispose of the Fee-simple by way of remaynder, when hee maketh the gift in taile, or for lives, then the Fee-simple resteth in himselfe as a Reversion. The difference betweene a Reversion and a Remaynder is this. The Remainder is alwayes a succeeding estate, appointed upon the gifts of a precedent estate, at the time when the precedent is appointed. But the Reversion is an estate left in the giver, after a particular estate made by him for yeares, life, or entaile;

The last & greatest estate in land is Fee-simple.

A remainder cannot be limited upon an estate in Fee-simple,

The difference betweene a remainder and a reversion.

entaile; where the remainder is made with the particular estates, then it must be done by deeds in writing, with livery and seisin, and cannot be by words; And if the giver will dispose of the Reversion after it remaineth in himselfe, hee is to doe it by writing, and not by word, and the Tenant is to have notice of it, and to atturne it, which is to give his assent by Word, or paying rent, or the like; and except the tenant will thus atturn, the party to whom the Reversion is granted cannot have the Reversion, neither can hee compell him by any law to atturne, except the grant of the Reversion be by fine; and then hee may by Writ provided for that purpose: and if he doe not purchase that Writ, yet by the fine the Reversion shall passe; and the tenant shall pay no rent, except he will himselfe, nor be punished for any wastes in Houses, Woods, &c. unlesse it be granted by bargaine and sale by Indenture enrolled; These Fee-simple Estates lie open to all perils of Forfeitures, Extents, Incumbrances, and Sales.

A reversion cannot be granted by word.

Atturnment must be had to the grant of the Reversion.

The tenant not compellable to atturn but where the Reversion is granted by fine.

Lands may be conveyed six manner of wayes.
1. By Feofment.
2. By Fine.
3. By Recovery.
4. By Use.
5. By Covenant.
6. By Will.

Lands are conveyed by these six means; First, by Feofment, which is, where by Deed lands are given to one and his heires, and livery and seisin made according to the forme and effect of the Deed; if a lesser estate then Fee-simple be given, and livery of seisin made, it is not called a Feofment, except the Fee-simple bee conveyed, but is otherwise called a Lease for life or gift entaile as above mentioned.

What a Feofment of Land is.

A

A Fine is a reall agreement, beginning thus, *Hæc est finalis concordia, &c.* This is done before the Kings Judges in the Court of Common Pleas, concerning Lands that a man ſhould have from another to him and his heires, or to him for his life, or to him and the heires males of his body, or for yeares certaine, whereupon rent may be reſerved, but no condition or covenants. This Fine is a Record of great credit, and upon this Fine are foure Proclamations made openly in the Common Pleas; that is, in every Terme one for foure Termes together; and if any man having right to the ſame, make not his claime within five yeares after the Proclamations ended, he loſeth his right for ever, except he be an Infant, a Woman covert, a Mad-man, or beyond the Seas, and then his right is ſaved; ſo that hee claim within five yeares after the death of her husbands full age, recovery of his wits, or return from beyond the Seas. This Fine is called a Feofment of Record, becauſe that it includeth all that the Feofment doth, and worketh further of his own nature, and barreth entails peremptorily, whether the heire doth claime within five yeares or not, if he claime by him that levied the Fine.

What a fine is, & how lands may be conveyed hereby.

Five yeares non claime barreth not,
1. An Infant.
2. Feme covert.
3. Mad-man.
4. Beyond Sea.

Fine is a Feofment of Record.

Recoveries are where for aſſurances of Lands the parties do agree, that one ſhall begin an action reall againſt the other, as though hee had good right to the Land, and the other ſhall not enter into defence againſt it, but alleadge that hee bought the Land of *I. H.* who had warranted unto him, and pray that *I. H.* may be called in to

What Recoveries are.

defend the Title, which *I.H.* is one of the Cryers of the Common Pleas, and is called the *Common Voucher*. This *I. H.* ſhall appeare and make as if hee would defend it, but ſhall pray a day to be aſſigned him in his matter of defence; which being granted him, at the day he maketh default, and thereupon the Court is to give Judgement againſt him; which cannot be for him to loſe his lands, becauſe hee hath it not, but the party that hee hath ſold it to, hath that who vouched him to warrant it.

Common Voucher one of the Cryers of the Court.

Therefore the Demandant who hath no defence made againſt it, muſt have Judgement to have the land againſt him that hee ſued (who is called the Tenant) and the Tenant is to have Judgement againſt *I.H.* to recover in value ſo much land of his, where in truth hee hath none, nor never will. And by this device grounded upon the ſtrict Principles of Law, the firſt tenant loſeth the land, and hath nothing for it; but it is by his owne agreement for aſſurance to him that brought it.

Judgement for the Demandant againſt the tenant in taile.

Judgement for tenant to recover ſo much land in value of the common Voucher.

This Recovery barreth Entailes, and all Remainders and Reverſions, that ſhould take place after the Entailes, ſaving where the King is giver of the Entaile and keepeth the reverſion to himſelfe; then neither the heire, nor the Remaynder, nor Reverſion, is barred by the recovery.

A recovery barreth an Eſcheat taile and all Reverſions and remaindments thereupon.

The reaſon why the Heires, Remaynders, and Reverſions are thus barred, is becauſe in ſtrict Law the recompence adjudged againſt the Cryer that was Vouchee, is to goe in ſucceſſion of Eſtate

The reaſon why a Common recovery barreth thoſe in remainder and reverſions.

ſtate as the land ſhould have done, and then it was not reaſon to allow the heire the liberty to keepe the land it ſelfe, and alſo to have recompence; and therfore he loſeth the land, and is to truſt to the recompence.

The many inconveniences, of Eſtates in taile brought in theſe recoveries, which are made now common conveyances and aſſurances for land.

This ſleight was firſt invented, when entails fell out to be ſo inconvenient as is before declared, ſo that men made no conſcience to cut them off, if they could finde law for it. And now by uſe, thoſe recoveries are become common aſſurances againſt Entails, Remainders, and Reverſions, and are the greateſt ſecurity purchaſers have for their monies; for a fine will barre the heire in taile, and not the remaynder, nor Reverſion, but a common recovery will barre them all.

Upon Fines, Feofments, and Recoveries, the eſtate doth ſettle according to the intent of the parties.

Upon Feofments and Recoveries, the Eſtate doth ſettle as the uſe and intent of the parties is declared by word or writing, before the Act was done; As for example, if they make a writing, that one of them ſhall levy a Fine, make a Feofment, or ſuffer a common recovery to the other; but the uſe and intent is, that one ſhould have it for his life, and after his deceaſe, a ſtranger to have it in taile, and then a third in Fee-ſimple. In this caſe the land ſetleth in an eſtate according to the uſe and intent declared. And that by reaſon of the Statute made 27. *H.* 8. conveying the land in poſſeſſion to him that hath intereſt in the uſe, or intent of the Fine, Feofment, or Recovery, according to the uſe and intent of the parties.

Bargains, Sales and Covenants to ſtand ſeized to a uſe, are all grounded upon one Statute.

Upon this Statute is likewiſe grounded the fourth and fifth of the ſixe Conveyances, *viz.* Bargains, Sales, Covenants, to ſtand ſeized to uſes; for this Statute whereſoever it findeth an uſe, conjoyneth the poſſeſſion to it, and turneth it into like quality of Eſtate, Condition, Rent, and the like, as the uſe hath.

What a uſe is.

The uſe is but the equity and honeſty to hold the Land *in conſcientia boni viri*. As for example; I and you agree that I ſhall give you money for your land, and you ſhall make mee aſſurance of it. I pay you the money, but you made mee no aſſurance of it. Here although the eſtate of the Land be ſtill in you, yet the equity and honeſty to have it is with me; and this equity is called the uſe, upon which I had no remedy but in Chancery, untill this Statute was made of 27. *H.* 8. and now this Statute conjoyneth and containeth the Land to him that hath the uſe. I for my money paid to you, have the Land it ſelfe, without any other Conveyance from you; and it is called a bargain and ſale.

Before 27 H.8. there was no remedy for a uſe, but in Chancery.

The Stat. of 27. H.8. doth not paſſe land upon the payment of money without a deed indented and enrolled.

But the Parliament that made that Statute did foreſee, that it would be miſchievous that mens Lands ſhould ſo ſodainly upon the payment of a little money be conveyed from them, peradventure in an Alehouſe or a Tavern upon ſtrainable advantages, did therefore gravely provide another Act in the ſame Parliament, that the Land upon payment of this money ſhould not paſſe away, except there were a Writing indented, made between the ſaid two parties, and the ſaid Writing alſo

alſo within ſix moneths inrolled in ſome of the Courts at Weſtminſter, or in the Seſſions Rolls in the Shire where the land lyeth; unleſſe it be in Cities or Corporate Townes where they did uſe to enroll Deeds, and there the Statute extendeth not.

The St. of 27.H.8 extendeth not into Cities and corporate Townes where they did uſe to enroll Deeds.

The fifth Conveyance of a Fine is a Conveyance to ſtand ſeized to uſes: it is in this ſort; A man that hath a wife and children, brethren, and kinsfolks, may by writing under his Hand and Seale, agree, that for their or any of their preferment he will ſtand ſeized of his Lands to their uſes, either for life in taile or Fee, ſo as he ſhall ſee cauſe; upon which agreement in Writing, there ariſeth an equity or honeſty, that the Land ſhould go according to thoſe agreements; Nature and Reaſon allowing theſe proviſions; which equity and honeſty is the uſe. And the uſe being created in this ſort, the Statute of 27.*H*.8. before mentioned, conveyeth the eſtate of the Land, as the uſe is appointed.

A conveyance to ſtand ſeized to a uſe.

Upon an agreement in writing to ſtand ſeized to the uſe of any of his kindred, a uſe may be created, & the eſtate of the land thereupon executed, by 27.H.8.

And ſo this Covenant to ſtand ſeized to uſes, is at this day ſince the ſaid Statute, a Conveyance of Land, and with this difference from a bargaine and ſale; in that this needeth no inrollment as a bargaine and ſale doth, nor needeth it to be in writing indented, as bargaine and ſale muſt: and if the party to whoſe uſe hee agreeth to ſtand ſeized of the Land, be not wife, or childe, couſin, or one that hee meaneth to marry, then will no uſe riſe, and ſo no Conveyance; for although the Law alloweth ſuch weightie

A covenant to ſtand ſeized to a uſe needeth no enrollment as a bargaine and ſale to a uſe doth, ſo it be to the uſe of Wife, Childe, or Couſin, or one he meaneth to marry.

Considerations of marriage and blond to raise uses, yet doth it not admit so trifling Considerations, as of Acquittance, Schooling, Services, or the like.

Upon a Fine, Feofment, or Recovery a man may limit the use to whom he listeth, without consideration of blond, or money. Otherwise, in a bargain and sale, or covenant.

But where a man maketh an estate of his land to others, by Fine, Feofment, or Recovery, hee may then appoint the use to whom hee listeth, without respect of Marriage, Kindred, or other things; for in that case his owne Will and Declaration guideth the equity of the estate. It is not so when hee maketh no estate, but agreeth to stand seized, nor when he hath taken any thing, as in the cases of bargaine and sale, and covenant, to stand to uses.

Of the continuance of land by Will.

The last of the six Conveyances, is a Will in writing; which course of Conveyance was first ordained by a Statute made 32. *H.* 8. before which Statute no man might give land by will, except it were in a Borough Towne, where there was an especiall custome that men might give their Lands by will; as in London, and many other places.

The not disposing of lands by will, was thought to be a defect at the common Law.

The not giving of Land by Will, was thought to be a defect at Common Law, that men in wars, or suddenly falling sick, had not power to dispose of their Lands, except they could make a Feofment, or levy a Fine, or suffer a Recovery; which lacke of time would not permit: and for men to doe it by these meanes, when they could not undoe it againe, was hard; besides, even to the last houre of death, mens mindes might alter upon further proofs of their Children or Kindred, or

encrease

encreaſe of children or debt, or defect of ſervants or friends to be altered.

For which cauſe, it was reaſon that the Law ſhould permit him to reſerve to the laſt inſtant the diſpoſing of his lands, and to give him meanes to diſpoſe it, which ſeeing it did not fitly ſerve, men uſed this deviſe.

The Court that was invented before the St. of 32. H.8. firſt gave power to deviſe Lands by Will, which was a Conveyance of lands to Feoffees in truſt, to ſuch perſons as they ſhould declare in their Will.

They conveyed their full eſtates of their lands in their good health, to friends in truſt, properly called Feoffees in truſt; and then they would by their wils declare how their friends ſhould diſpoſe of their Lands; and if thoſe friends would not performe it, the Court of Chancery was to compell them, by reaſon of truſt; and this truſt was called, the uſe of the Land, ſo as the Feoffees had the land, and the party himſelfe had the uſe; which uſe was in equity, to take the profits for himſelfe, and that the Feoffees ſhould make ſuch an eſtate as hee ſhould appoint them; and if he appointed none, then the uſe ſhould goe to the heire, as the eſtate it ſelfe of the land ſhould have done; for the uſe was to the eſtate like a ſhadow following the body.

The inconveniences of putting land into uſe.

By this courſe of putting lands into uſe, there were many inconveniences, (as this uſe which grew firſt for a reaſonable cauſe,) *viz.* To give men power and liberty to diſpoſe of their owne, was turned to deceive many of their juſt and reaſonable rights; as namely, a man that had cauſe to ſue for his land, knew not againſt whom to bring his Action, nor who was Owner of it. The wife was defrauded of her thirds. The husband

of

of being Tenant by courteſie. The Lord of his Wardſhip, Reliefe, Heriot, and Eſcheat. The Creditor of his Extent for debt. The poore Tenant of his Leaſe; for theſe right and duties were given by Law from him that was Owner of the Land, and none other; which was now the Feoffee of truſt, and ſo the old Owner which wee call the Feoffor ſhould take the profits, and leave the power to diſpoſe of the Land at his diſcretion to the Feoffee, and yet hee was not ſuch a Tenant as to be ſeized of the Land, ſo as his wife could have Dower, or the Lands be extended for his Debts, or that he could forfeit it for Felony or Treaſon, or that his heire could be Ward for it, or any duty of tenure fall to the Lord by his death, or that he could make any Leaſes of it.

The frauds of conveyances to uſe by degrees of time, as they increaſed, were remedied by the Statutes.

Which frauds by degrees of time as they encreaſed, were remedied by divers Statutes; as namely by a Statute of 1. *H.* 6. and 4. *H.* 8. it was appointed that the action may be tryed againſt him which taketh the profits, which was then *Ceſtuy que uſe* by a Statute made 1. *R.* 3. Leaſes and Eſtates made by *Ceſtuy que uſe* are made good, and Eſtat. by him acknowledged. 4. *H.* 7. the heire of *Ceſtuy que uſe* is to be in Ward: 16. *H.* 8. the Lord is to have reliefe upon the death of any *Ceſtuy que uſe*.

1. H. 6.
4 H. 8.
1 R. 3.
4. H. 7.
16. H. 8.
} Stat. binding Ceſtuy que uſe.

Which

Which frauds nevertheleſſe multiplying daily, in the end 27. *H.*8. the Parliament purpoſing to take away all thoſe uſes, and reducing the Law to the ancient forme of conveying of lands by publike livery of Seiſin, Fine, and Recovery; did ordain, that where lands were put in truſt or uſe, there the poſſeſſion and eſtate ſhould be preſently carried out of the friends in truſt, and ſetled and inveſted on him that had the uſes, for ſuch tearme and time as he had the uſe.

27 H.8. taking away all uſes reduceth the Law to the ancient forme of Conveyances of Land, by Feoffment, Fine, and Recovery.

By this Statute of 27. *H.*8. the power of diſpoſing Land by Will, is cleerly taken away amongſt thoſe frauds; whereupon 32. *H.*8. another Statute was made, to give men power to give lands by Will in this ſort. Firſt, it muſt be by Will in writing. Secondly, hee muſt be ſeized of an Eſtate in Fee-ſimple; For tenant for another mans life, or tearme in taile, cannot give land by Will, by that Statute 32. *H.*8. hee muſt be ſolely ſeized, and not joyntly with another; and then being thus ſeized, for all the Land hee holdeth in Soccage Tenure, hee may give it by Will, except he hold any piece of Land in *Capite* by Knights Service of the King; and then laying all together, hee can give but two parts by Will; for the third part of the whole, as well in Soccage as in *Capite*, muſt deſcend to the heire, to anſwer Wardſhip, Livery, and Primer Seiſin, to the Crown.

In what manner the St. of 32. H.8. giveth power to diſpoſe of Lands by Will.

If a man be ſeized of Capite Lands and Soccage, hee cannot deviſe but two parts of the whole.

The third part must descend to the heire to answer Guardship, Livery and Seisin to the Crown.

A conveyance by devise of Capite Lands to the wife for her joynture, or to his children for their good, or to pay debts is void for a third part, by 32. H. 8.

And so if he hold Lands by Knights Service of a subject, he can devise of the Land but two parts, and the third the Lord by Wardship, and the heire by descent is to hold.

And if a man that hath three Acres of Land holden in *Capite* by Knights Service, doe make a joynture to his Wife of one, and convey another to any of his children, or to friends, to take the profits, and to pay his debts or legacies, or daughters portions, then the third Acre or any part thereof hee cannot give by Will, but must suffer it to descend to the heire, and that must satisfie Wardship.

But a conveyance by act executed in the life time of the party of such lands to such uses is not void, but a third part: but if the heire be within age, hee shall have one of the Acres to be in Ward.

Yet a man having three Acres as before, may convey all to his wife or children by Conveyance in his life time, as by Feofment, Fine, Recovery, Bargain and sale, or covenant to stand seized to uses and to disinherit the heire. But if the heire be within age when his Father dieth, the King or other Lord shall have that heire in Ward, and shall have one of the three Acres during the Wardship, and to sue Livery and Seisin. But at full age the heire shall have no part of it, but it shall go according to the Conveyance made by the Father.

Afflictis afflictionem addere.

Entailed Lands part of the thirds. The King nor Lord cannot intermeddle if a ful third part be left to descend to the heire.

It hath beene debated how the thirds shall be set forth. For it is the use that all Lands which the Father leaveth to descend to the heire, being Fee-simple, or in taile, must be part of the thirds; and if it be a full third, then the King, nor heire, nor Lord, can intermeddle with the rest; If it be not a full third yet they must take it so much as

it

it is, and have a ſupply out of the reſt.

This ſupply is to be taken thus; if it be the Kings Ward, then by a Commiſſion out of the Court of Wards, whereupon a Jury by oath, muſt ſet forth ſo much as ſhall make up the thirds, except the Officers of the Court of Wards can otherwiſe agree with the parties. If there be no Wardſhip due to the King, then the other Lord is to have this ſupply by a Commiſſion out of the Chancery, and Jury thereupon.

The manner of making ſupply when the part of the heire is not a full third.

But in all thoſe caſes the Statutes do give power to him that maketh the Will to ſet forth and appoint of himſelfe which Lands ſhall go for thirds, and neither King nor Lord can refuſe it. And if it be not enough, yet they muſt take that in part, and onely have a ſupply in manner as before is mentioned out of the reſt,

The Satutes give power to the Teſtator to ſet out the third himſelf, and if it be not a third part, yet the King or Lord muſt take that in part, and have a ſupply out of the Rent.

Propertie in Goods.

Of the ſeverall ways whereby a man may get Property in Goods or Chattels.

1. By Gift,
2. By Sale.
3. By Stealing.
4. By Waving.
5. By Straying.
6. By Shipwrack.
7. By Forfeiture.
8. By Executorſhip.
9. By Adminiſtration.
10. By Legacy.

1. *Property by Gift.*

A deed of gift of goods to deceive his Creditors is void againſt thé, but good againſt the Executors, Adminiſtrators, or Vender of the party himſelfe.

BY gift the property of goods may be paſſed by word or writing; but if there be a generall Deed of gift made of all his Goods, this is ſuſpitious to be done upon fraud, to deceive the Creditors.

And if a man who is in debt, make a Deed of gift of all his goods to protract the taking of them in Execution for his debt, this deed of gift is void, as againſt thoſe to whom he ſtood indebted; but as againſt himſelfe, his owne Executors or Adminiſtrators, or any man to whom afterwards he ſhall ſell or convey them, it is good.

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2. *By Sale.*

What is a ſale *bona fide* and what not, when there is a private reſervation of truſt between the parties.

PRoperty in goods by Sale. By Sale any man may convey his owne goods to another; and although he may feare Execution for debts, yet he may ſell them out-right for money at any time before the Execution ſerved, ſo that there be no reſervation of truſt between them, paying the money, he ſhall have the goods againe; for that truſt in ſuch caſe, doth prove plainly a fraud to prevent the Creditors from taking the goods in Execution.

3. *By*

3. *By Theft or taking in Ieſt.*

PRoperty of Goods by Theft or taking in Jeſt. If any man ſteale my Goods or Chattels, or take them from mee in Jeſt, or borrow them of me, or as a Treſpaſſer or Felon carry them to the Market or Faire, and ſell them, this Sale doth barre mee of the property of my goods, ſaving that if hee bee a horſe hee muſt bee ridden two houres in the Market or Faire, betweene ten and five a clock, and Tolled for in the Toll-book, and the Seller muſt bring one to avouch his ſale, knowne to the Toll-book-keeper, or elſe the ſale bindeth me not. And for any other goods, where the Sale in a Market or Faire ſhall bar the owner being not the ſeller of his Property, it muſt be ſale in a Market or Faire where uſual y things of that nature are ſold. As for example: If a man ſteale a horſe, and ſell him in Smithfield, the true owner is barred by this Sale; but if hee ſell the horſe in Cheapſide, Newgate or Weſtminſter Market, the true Owner is not barred by this Sale; becauſe theſe Markets are uſual for Fleſh, Fiſh, &c. and not for horſes.

How a ſale in Market ſhall be a bar to the owner.

Of Markets, and what Markets ſuch a ſale ought to be made in.

So whereas by the cuſtome of *London* in every Shop there is a Market all the dayes of the week, ſaving Sundayes and Holi-dayes; Yet if a piece of Plate or Jewell that is loſt, or Chaine of Gold or Pearle that is ſtoln or borrowed, be ſold in a Drapers or Scriveners ſhop, or any others but a Goldſmith, this ſale barreth not the true owner, *Et ſic in ſimilibus.*

The Owner may seize his goods after they are stolne.

Yet by stealing alone of Goods, the Thiefe getteth not such property, but that the owner may seize them againe whersoever hee findeth them; except they were sold in Faire or Market, after they were stolne; and that *bona fide* without fraud.

If the Thiefe be condemned for Felony, or Out-lawed, or forfeit the stolne goods to the Crown, the owner is without remedy. But if he make fresh pursuit, he may take his goods from the Thiefe,

But if the Thief be condemned of the Felony, or Out-lawed for the same, or outlawed in any personall action, or have committed a forfeiture of goods to the Crowne, then the true owner is without remedy.

Or if he prosecuted the Law against the Thiefe and convict him of the same Felony, hee shall have his goods againe by a Writ of Restitution.

Nevertheless if fresh after the goods were stolne, the true Owner maketh pursuit after the Thiefe and goods, and taketh the goods with the Thiefe, he may take them again: And if he make no fresh pursuit, yet if hee prosecute the Felon, so farre as Justice requireth, that is to have him arraigned, indicted, and found guilty (though he be not hanged, nor have Judgement of death) or have him Out-lawed upon the Indictment; in all these cases he shall have his goods againe, by a Writ of Restitution to the party in whose hands they are.

4. By

4. *By waving of Goods.*

BY waving of Goods, a property is gotten thus. A Thiefe having ſtoln goods, being purſued flyeth away and leaveth the goods. This leaving is called waving, and the property is in the King; except the Lord of the Mannor have right to it, by Cuſtome or Charter.

But if the Felon be indicted, adjudged, or found guilty, or Out-lawed at the ſuit of the Owner of theſe goods, hee ſhall have reſtitution of theſe goods, as before.

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5. *By Straying.*

BY Straying, property in live Cattell is thus gotten. When they come into other mens grounds ſtraying from the Owners, then the party or Lord into whoſe grounds or Mannors they come, cauſeth them to be ſeized, and a With put about their necks and to be cryed in three Markets adjoyning, ſhewing the Marks of the Cattel; which done, if the true Owner claimeth them not within a yeare and a day, then the property of them is in Lord of the Mannor whereunto they did ſtray, if he have all ſtrayes by Cuſtome or Charter, elſe to the King.

6. *Wracke, and when it ſhall be ſaid to be.*

BY Shipwracke, propery of goods is thus gotten! When a Ship loaden is caſt away upon the Coaſts, ſo that no living creature that was in it when it began to ſink eſcapeth to land with life, then all thoſe goods are ſaid to be wracked, and they belong to the Crown if they be found; except the Lord of the Soile adjoyning can entitle himſelfe unto them by Cuſtome, or by the Kings Charter.

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7. *Forfeitures.*

BY Forfeitures, Goods and Chattels are thus gotten. If the owner be outlawed, if hee be indicted of Felony, or Treaſon, or either confeſſe it, or be found guilty of it, or refuſe to be tryed by Peeres or Jury; or be attainted by Judgement, or flie for Felony; although hee be not guilty, or ſuffer the Exigent to goe forth againſt him; although hee be not outlawed, or that hee goe over the Seas without licence, all the goods he had at the Judgement, hee forfeiteth to the Crowne; except ſome Lord by Charter can claime them. For in thoſe caſes preſcripts will not ſerve, except it be ſo ancient, that it hath had allow-

allowance before the Justices in Eyre in their Circuits, or in the Kings Bench in ancient time.

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8. *By Executorship.*

BY Executorship goods are gotten. When a man possessed of Goods maketh his last Will and Testament in writing or by word, and maketh one or more Executors thereof; These Executors have by the Will and death of the parties, all the property of their Goods, Chattels, Leases for yeares, Wardships and Extents, and all right concerning those things.

Those Executors may meddle with the goods and dispose them before they prove the Will, but they cannot bring an Action for any debt or duty before they have proved the Will.

Executors may before *probat* dispose of the goods, but not bring an action for any debt.

The proving of the Will is thus. They are to exhibit the Will into the Bishops Court, and there they are to bring the Witnesses, and there they are to bee sworne, and the Bishops Officers are to keep the Will Originall, and certifie the Copy thereof in Parchment under the Bishops Seale of Office, which Parchment so sealed, is called the Will proved.

What *probat* of the Will is, and in what manner it is made.

9. By Letters of Administration.

By letters of Administration property in goods is thus gotten. When a man possessed of goods dieth without any Will, there such goods as the Executors should have had if he had made a Will, were by ancient Law to come to the Bishop of the Diocesse, to dispose for the good of his soule that died, he first paying his Funerals and Debts, and giving the rest *Ad pios usus*.

Pii usus.

This is now altered by Statute Lawes, so as the Bishops are to grant Letters of Administration of the goods at this day to the Wife if shee require it, or children, or next of kinne; if they refuse it, as often they doe, because the debts are greater then the Estate will beare, then some Creditor or some other will take it as the Bishops Officers shall thinke meet. It groweth often in question what Bishop shall have the right of proving Wils, and granting Administration of goods.

Where the Intestate had *bona notabilia* in divers Diocesses, then the Archbishop of that Province where he died is to commit the Administration.

In which controversie the rule is thus, that if the party dead had at the time of his death *bona notabilia* in divers Diocesses of some reasonable value, then the Archbishop of the Province where he died is to have the Probat of his Will, and to grant the Administration of his goods as the case falleth out; otherwise, the Bishop of the Diocesse where he died is to doe it.

If

If there be but one Executor made, yet he may refuse the Executorship comming before the Bishop, so that he hath not intermedled with any of the goods before, or with receiving Debts, or paying Legacies.

Executor may refuse before the Bishop, if he have not intermedled the goods.

And if there be more Executors then one, so many as list may refuse; and if any one take it upon him, the rest that did once refuse may when they will take it upon them, and no Executor shall be further charged with Debts or Legacies, then the value of the goods come to his hands; So that hee fore-see that hee pay Debts upon Record, first Debts to the King, then upon Judgements, Statutes, Recognizances, then Debts by Bond and Bill sealed, Rent unpayed, Servants wages, payment to head Workmen, and lastly, Shop books, and Contracts by word. For if an Executor, or Administrator pay Debts to others before to the King, or Debts due by Bond before those due by Record, or Debts by Shop-books and Contracts before those by Bond, Arrerages of Rent, and Servants, or Workmens wages, hee shall pay the same over again to those others in the said degrees.

Executor ought to pay, 1. Judgements. 2. Stat. Recogn. 3. Debts by bonds and bils sealed. 4. Rent unpaid. 5. Servants wages. 6. Head workmen 7. Shop-book and Contracts by word.

But yet the Law giveth them choice, that where divers have Debts due in equall degree of Record or Specialty, he may pay which of them hee will, before any suite brought against him; but if suite be brought he must first pay them that get Judgement against him.

Debts due in equall degree of Record, the Executor may pay which of them he please before suit commenced.

Any one Executor may doe as much as all together, but if a debt be releaſed and Aſſets wanting, he ſhall onely be diſcharged.

Any one Executor may convey the goods, or releaſe Debts without his companion, and any one by himſelf may do as much as all together; but one mans releaſing of Debts or ſelling of Goods, ſhall not charge the other to pay ſo much of the goods, if there be not enough to pay debts; but it ſhall charge the party himſelf that did ſo releaſe or convey.

Otherwiſe of Adminiſtrators.

But it is not ſo with Adminiſtrators, for they have but one authority given them by the Biſhop over the goods, which authority being given to many is to be executed by all of them joyned together.

Executor dieth making his Executor, the ſecond Executor ſhall be Executor to the firſt Teſtator. But otherwiſe, if the Adminiſtrator die making his Executor, or if Adminiſtration be committed of his goods. In both caſes, the Ordinary ſhall commit Adminiſtration of the goods of the firſt inteſtate.

And if an Executor die making an Executor, the ſecond Executor is Executor to the firſt Teſtator.

But if an Adminiſtrator die inteſtate, then his Adminiſtrator ſhall not be Executor or Adminiſtrator to the firſt; But in that caſe the Biſhop, whom we call the Ordinary, is to commit the Adminiſtration of the firſt Teſtators goods to his Wife, or next of kin, as if hee had died inteſtate; Alwayes provided, that that which the Executor did in his life time, is to be allowed for good. And ſo if an Adminiſtrator die and make his Executor, the Executor of the Adminiſtrator ſhall not be Executor to the firſt inteſtate; But the Ordinary muſt new commit the adminiſtration of the goods of the firſt inteſtate again.

If

If the Executor or Administrator pay debts, or Funerals, or Legacies of his owne money, he may retaine so much of the goods in kinde, of the Testator or intestate, and shall have property of it in kinde.

Executors or Administrators may retain.

10. *Property by Legacie.*

PRoperty by Legacy, is where a man maketh a Will and Executors, and giveth Legacies, hee or they to whom the Legacies are given must have the assent of the Executors or one of them to have his Legacy, and the property of that Lease or other goods bequeathed unto him, is said to be in him; but hee may not enter nor take his Legacy without the assent of the Executors, or one of them; because the Executors are charged to pay Debts before Legacies. And if one of them assent to pay Legacies, hee shall pay the value thereof of his own purse, if there be not otherwise sufficient to pay debts.

Executors or Administrators may retaine; because the Executors are charged to pay some debts before Legacies.

But this is to be understood by Debts of Record to the King, or by Bill and Bond sealed, or Arrerages of Rent, or Servants or Workmens wages; and not Debts of Shop-books, or Bils unsealed, or Contract by word; for before them Legacies are to be paid.

Legacies are to be paid before debts by Shop-books, Bils unsealed, or Contracts by word.

And if the Executors doubt that they shall not have enough to pay every Legacy, they may pay which they list first; but they may not sell any speciall Legacy which they will to pay

Executor may pay which Legacie he will first.

If the Executors doe want they may sell any Legacie to pay debts.

Debts, or a Leaſe of goods to pay a money Legacy. But they may ſell any Legacy which they will to pay Debts, if they have not enough beſides.

When a Will is made and no Executor named, Adminiſtration is to be commited *cum teſtamento annexo.*

If a man make a Will and make no Executors, or if the Executors refuſe, the Ordinary is to commit Adminiſtration, *Cum Teſtamento annexo*, and take bonds of the Adminiſtrators to performe the Will, and hee is to doe it in ſuch ſort, as the Executor ſhould have done, if hee had beene named.

FINIS.